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**THE EUROPEAN COMMUNITY AND MINORITY
LANGUAGES:
A QUESTION OF COMPETENCE?**

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1999**

DECLARATION

The material in this thesis has not been submitted as an exercise at this or any other university. It has been composed by me and, apart from due acknowledgements, it is entirely my own work.

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ABSTRACT

This thesis examines the role, both actual and potential, of the European Community in the development of effective minority language policy. The study is confined to indigenous or autochthonous minority languages spoken in the EC Member States and focuses on the use of language in official or public domains. The involvement of the Community in language, and particularly minority language, issues is justified on a number of grounds, primarily on the basis that the dynamic of European integration has disrupted patterns of language use throughout the Member States. The reciprocal role of the Community is presented as a fundamental responsibility rather than a gesture of goodwill. The present official languages policy of the EC is outlined briefly, followed by a more extensive discussion on measures initiated by the institutions that deal with minority languages specifically and on relevant decisions of the European Court of Justice.

The respective competence of the Community and the Member States in this policy domain is explored, with particular emphasis on the application of the principle of subsidiarity. It is established that subsidiarity does not always preclude action by the Community and may, in fact, require the implementation of EC measures in certain circumstances. Initiatives in favour of minority languages are proposed in the context of the promotion of diversity, grounded in cultural policy, the protection of fundamental rights and the realisation of effective European citizenship. The expansion of these policy domains to encompass such measures is justified, within the contemporary political culture of non-harmonisation, respect for national and regional identity, and the development of minimum standards. Objections to this evolution of Community policy are shown to contradict the fundamental ethos of pluralism and diversity, and to exist in the political rather than in the legal realm.

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Míle buíochas díobh go léir.

Modern life is supposed to tend to break down all the barriers of nationality, of race and even of language, and to weld the nations of the earth into one mighty mass. That something like this may not be witnessed in a future stage of the world's history I am not prepared to deny....However...side by side with the levelling tendency which annihilates distinctions and which would have one law, one language, one cosmopolitan character throughout...there is a counter tendency of a natural and involuntary character constantly emphasising distinctions and building up local differences, tending to make languages.

J.E. Southall

Wales and her Language

1893

INTRODUCTION

Throughout the 1980s, the European Parliament called on the Member States of the European Community to recognise and provide for the rights of linguistic minorities that resided within their territories. The European Court of Justice recognised that national linguistic policy could, under certain circumstances, restrict the Community right of the free movement of workers. The Community began to finance cultural and educational projects related specifically to the maintenance of minority languages. The preservation and promotion of linguistic diversity was thus emerging as a legitimate constraint on the forces of economic and political integration. But the Community institutions had to rely on the intrinsic value of linguistic diversity *per se*, rather than on any explicit or justiciable competence, to establish and develop their stance in favour of minority languages. The Treaty of Rome referred to language only in so far as it provided that all official versions of the Treaty were to be considered equally authentic. The principle of the equality of all official Community languages, in respect of the administration of the Community more generally, evolved from this vague declaration. But the position of non-official languages was not addressed, in either the Treaty itself or related secondary legislation. As with a number of other policy domains, EC action on minority language issues was assumed to have been legitimated retrospectively, by the additional Community competences outlined in the Treaty on European Union. Article 128 EC, in particular, reflects the cultural diversity of the Member States and sub-national regions and, therefore, of the Community itself. It further provides for a Community 'contribution' to the preservation and promotion of this diversity.

Action taken in favour of minority languages is usually considered in this broader context of cultural policy rather than as a separate, evolving domain within the ongoing delimitation of Community and Member State competence. To date, limitations on the legal basis for Community action, even within the remit of cultural policy, have been assumed rather than established. Similarly, the relatively recent insistence by the Commission that, because of the principle of subsidiarity, the

Community is debarred from taking any action in the cultural context that would have political consequences in the Member States, has been neither substantiated nor challenged. In essence, two questions must be addressed. First, in a general sense, which level of government, Community or Member State, can do what, in the context of shared competence? Second, and more specifically, what are the boundaries of constraint to which the Community is subject in respect of its initiated but incoherent policy on minority languages?

This thesis thus explores a central question of European law using the specific example of minority language policy, an ostensibly peripheral, but widely applicable, theoretical framework. In this context, it will be shown that minority language issues relate just as much to fundamental rights and citizenship as to culture. This brings minority language policy firmly within the realm of contentious, contemporary questions faced by the Community, as it strives to redress the so-called democratic deficit within its structures of government and administration. The recognition of linguistic rights for speakers of minority languages is a highly controversial question in its own right, generating fierce political debate, and resistance, at both national and international levels. In this sense, the promotion of minority language rights by the Community has considerable implications for its relations with the Member States as well as for the implementation of its responsibilities as a governing entity. Should the Community grapple with or avoid potentially divisive quandaries that are not related centrally to its economic policies? Does the placidity of the Member States or the inclusion of European citizens take precedence where these values come into conflict?

In Chapter 1, background principles and terminology are outlined and explained. Basic tenets of sociolinguistic theory are introduced, to establish the legitimacy and value of minority languages in the first instance and to justify the recognition of minority language rights by all levels of government. The framework of the official languages policy of the European Community is detailed, with emphasis placed on the need and potential for reform of the existing arrangements. The emergence of a

Community policy relating specifically to minority languages is traced in Chapter 2, which analyses resolutions of the institutions and decisions of the Court of Justice that were issued before the adoption of the Treaty on European Union. Chapter 3 discusses the ongoing debate on the division of Community and Member State competence, addressing legal and political arguments to establish both the scope of and limitations on EC action in the shared policy domains. Chapters 4 and 5 focus specifically on changes introduced by the Treaty on European Union and proposed by the Amsterdam Treaty, in the fields of cultural policy, and fundamental rights and citizenship respectively. Both chapters focus directly on the implications of the amended provisions for the evolving Community stance on minority languages. Finally, the actual development of Community policy *since* the introduction of the Maastricht and Amsterdam treaties is evaluated, to ascertain how the Community itself has interpreted the changes introduced.

As stated earlier, the conclusions drawn relate to both general and specific aspects of European law. The establishment of legitimate bases for policy implementation is one of the central concerns of *any* governing entity but is one of the most contentious questions within European Community relations in particular. By focusing on the specific and inherently controversial domain of minority language policy, this question is addressed and answered from a pragmatic as well as theoretical standpoint, providing comparative guidelines for other ambiguous or seemingly peripheral competences.

CHAPTER 1

GENERAL REVIEW OF EC LANGUAGE POLICY

1. INTRODUCTION

The evolution from European Community to European Union demonstrates the commitment of the Member States to increased economic, social and political integration. As Community law continues to penetrate and harmonise numerous spheres of contemporary life, the diversity displayed by the distinct languages spoken in the Member States stands in marked contrast. Coulmas identifies this fact as somewhat of a mixed blessing, outlining two prevailing, but opposing, views: linguistic diversity is often praised as a 'celebration', as an invaluable cultural asset; but it has also been denounced as a divisive obstacle, thwarting the achievement of true European unity.¹ While European policies that deal specifically with language issues are not particularly numerous, the dynamic of Community law generally has a definite impact on language use patterns throughout the Member States.² The European Commission has declared that no-one should be penalised, either socially or economically, for using his/her vernacular language, despite the demands of an increasingly multilingual world.³ While the potentially corrosive influence of European integration on the security of *national* languages and cultures cannot be underestimated, the consequences for speakers of regional, minority and non-official languages are particularly acute and, as such, merit specific consideration.

¹ Florian Coulmas, "European integration and the idea of the national language", in Coulmas (ed.), *A Language Policy for the European Community: Prospects and Quandaries*, (Berlin; New York: Mouton de Gruyter, 1991), 1-44 at 2.

² Pádraig Ó Riagáin, "National and international dimensions of language policy when the minority language is a national language: The case of Irish in Ireland", in Coulmas (ed.), *supra* note 1, 225-278 at 255.

³ European Commission, "Language engineering in the European Community", (1992) vol. 16:3 *Language Problems and Language Planning*, 249-252 at 250;
Joshua A. Fishman, a sociolinguist, writes in a similar manner, discussing the value of cultural protection at the micro-level, in conjunction with economies of scale at the macro-level: *cf. Language and Ethnicity in Minority Sociolinguistic Perspective*, (Clevedon, Avon: Multilingual Matters Ltd., 1989), p. 3.

Debate on European linguistic diversity is usually poised as a conflict between sentiment and efficiency, yet neither extreme premise, when considered in isolation, is convincing or pragmatic. This Chapter first places the thesis in the context of contemporary sociolinguistic and philosophical theory on linguistic diversity. In particular, the significance of diversity within the evolving European polity is established and justified. The present language policy regime of the Community is then outlined: the focus at this stage is on the *official* languages of the Community. A coherent policy on minority languages does not yet exist at EC level: examining the official languages policy will, however, identify the Community ethos on language issues more generally. Any reforms recommended for the accommodation of minority languages can then be assessed against this broader context. It will become apparent that reform of the EC languages regime generally is advocated, but from the standpoint of diversity rather than the more usually professed doctrine of homogeneity.

It must also be noted at the outset that there is no widely accepted definition of a 'minority language' in international law. Neither can generally assumed characteristics of minority languages be taken for granted. For example, it is often thought that a language cannot be recognised officially, particularly as a national language, to qualify as a minority language. But a significant number of minority languages *are* recognised in national constitutions or by legislation. Some languages, such as Irish and Luxembourgish, are even recognised as the national languages of their respective states. These difficulties of definition and interpretation are discussed at various stages throughout the thesis. It is particularly important to note that this study is limited in application to indigenous or autochthonous minority languages spoken within the territories of the EC Member States.

2. THE VALUE OF LINGUISTIC DIVERSITY

*If linguistic repression is the norm, then none of us should long for normality.*⁴

This section introduces the terminology, concepts and controversies related to philosophical and sociolinguistic theory on linguistic diversity. The principles introduced at this stage will later be applied to language questions that arise specifically in the context of the European Community.

A. Diversity v. Homogeneity

Concepts such as 'diversity', 'identity', 'ethnicity' and 'inclusion' have become the cornerstones of contemporary social theory: in particular, the emergence of the discipline of sociolinguistics has engendered widespread, interdisciplinary study of the role of language in society, rather than viewing language solely as an abstract or aesthetic concept. The evolving focus on inherently human - and often controversial - ideas, such as ethnicity, has evoked criticism that social scientists who promote the ideal of diversity are sentimentalists rather than objective realists. This has been confounded by negative, inferior associations with even the terminology used.⁵ What is often overlooked, however, is that ethnicity is as much a feature of more widespread, even dominant, groups as it is of minorities.⁶ Essentially, ethnicity is about difference; not superiority and not inferiority. Roche observes that the richness of linguistic diversity is often overlooked since its advantages "...don't show up on a balance sheet...."⁷ Appreciation of diversity must instead be based on an acceptance

⁴ Leslie Green, "Are language rights fundamental?", (1987) 25 *Osgoode Hall Law Journal*, 639-669.

⁵ cf. Fishman, *supra* note 3, pp. 11, 474, 561, 685 *et seq.* He outlines, for example, the "...confusion of ethnicity with politically troublesome collectivities, with rambunctious minorities, with 'difficult' peripheral and vestigial populations...." (p. 11).

⁶ cf. Hilary Tovey, Damian Hannan and Hal Abramson, *Why Irish? Irish Identity and the Irish Language*, (Dublin: Bord na Gaeilge, 1989), pp. 7-8.

cf. also European Commission, *Euromosaic: The Production and Reproduction of Minority Language Groups in the European Union*, (Luxembourg: Office for Official Publications of the European Communities, 1996), pp. 2-4.

of the link between human dignity and freedom of identity, as expressed by McDougal, Lasswell and Chen:

The conception of human dignity is fundamentally linked to the life of the mind which in turn is closely linked to language as a basic means of communication. Language is a rudiment of consciousness and close to the core of personality; deprivations in relation to language deeply affect identity.⁸

Certainly, many commentators experience discomfort when dealing with these concepts. They argue for efficiency and economy over sentiment. Furthermore, opinion is split on whether true unity and integration should overcome any sentimental attachment to identity. These questions are central to the ongoing debate on European integration and are considered in more detail *infra*.

B. The Idea of 'Planning' Language

Haarmann outlines the general philosophy of planning for linguistic diversity as follows:

[L]anguage politics has to do with the regulation of languages, their status and social functions on a national level. Language *politics* incorporates the ideas and conceptual framework of the envisaged regulation, while language *policies* implement such ideas.⁹

Language planning can, therefore, be described as a deliberate policy attempt to accommodate, and often to encourage or promote, the fact of linguistic diversity. Comprehensive and systematic language planning is often advocated as a preferable alternative to the inadequacy of an *ad hoc* approach. A distinction may be noted at the outset between 'corpus planning', which refers to the planning of vocabulary, grammar, *etc.* and 'status planning', which deals with official recognition of languages and with measures designed to deliberately influence language use in various domains. Status planning generally merits attention with the occurrence of 'language shift', *i.e.* "...the breakdown of a previously established societal allocation

⁷ Nick Roche, "Multilingualism in European Community meetings: A pragmatic approach", in Coulmas (ed.), *supra* note 1, 139-146 at 140.

⁸ Myres S. McDougal, Harold D. Lasswell and Lung-Chu Chen, "Freedom from discrimination in choice of language and international human rights", (1976) 1 *Southern Illinois University Law Journal*, 151-174 at 151.

⁹ Harald Haarmann, "Language politics and the new European identity", in Coulmas (ed.), *supra* note 1, 103-120 at 103.

of functions; the alteration of previously recognised role-relationships, situations and domains, so that these no longer imply or call for the language with which they were previously associated.”¹⁰ There is a danger, however, that planning for the survival or revival of a language can overemphasise the value of the language itself, without paying sufficient attention to its *speakers*, from the perspective of language choice and fundamental rights: this idea is discussed further in Chapter 5 *infra*, in the context of policies based on linguistic survival (language-based) versus those grounded in linguistic security (speaker-oriented).

The European Community is a multilingual, multicultural phenomenon. Questions of language planning are acutely pertinent, from those that seek to reduce the number of languages used within the institutions, thus striving towards increased linguistic uniformity, to those advocating interventionist protection of the numerous minority languages spoken within the Community realm. In the context of compromise, it is sometimes suggested that the adoption of a non-interventionist *laissez-faire*, or ‘survival of the fittest’, approach should be encouraged, accompanied by the concurrent promotion of ‘linguistic freedom’.¹¹ But can such freedom, a balance between the cultural value of languages that are weak and those which are considerably stronger, be generated in the abstract, independently of deliberate Community or national government strategies?¹² It is difficult to envisage the ‘promotion of linguistic freedom’ without *some* degree of intervention. Fishman categorises the alternative ‘survival of the fittest’ mindset as the law of the jungle and advocates that it is for this very reason we should leave it behind.¹³

¹⁰ Fishman, *supra* note 3, p. 212.

¹¹ cf. Giulio Lepschy, “How many languages does Europe need?”, in M.M. Parry, W.V. Davies and R.A.M. Temple, *The Changing Voices of Europe: Social and Political Changes and their Linguistic Repercussions, Past, Present and Future*, (Cardiff: University of Wales Press, 1994), 1-21 at 12.

¹² cf. Elisabetta Zuanelli, “Italian in the European Community: An educational perspective on the national language and new language minorities”, in Coulmas (ed.), *supra* note 1, 291-300 at 297.

¹³ Fishman, *supra* note 3, pp. 392-3.

Quite apart from questions of Community competence in the sphere of language planning, there is considerable divergence of opinion on the appropriate theoretical basis for language planning intervention at any level of government. Essentially, claims can hinge on either the moral or political order. Green, for example, argues that language claims are fundamental rights grounded in the moral order, since it can be shown that the protection of language rights is a sufficient interest to generate a corresponding duty.¹⁴ He is relatively pessimistic in respect of language claims that are not seen as moral rights, since their implementation would then rest on the precarious discretionary will of the political order. In contrast, Rubin, while critical of systems of implementation that leave inordinate discretion to the implementing body or state, argues that "...much effort has been spent trying to invoke legal results from argumentation in the moral order that could have been better spent trying to achieve political results directly."¹⁵ This viewpoint does not, however, address Green's assertion that political bases are *inherently* susceptible to discretionary trends. These arguments are examined in detail in Chapter 5 *infra*, which focuses on the classification of language rights as legitimate fundamental rights. It is important to stress at this stage, however, that language planning alone will not redress sufficiently the broader causes of, or trends within, language shift in the first place. Edwards notes that "[a] logical approach to language maintenance, and the halting of decline and shift, is to unpick the social fabric that has evolved and then reweave it in a new pattern."¹⁶ Examples of the broader societal concerns at issue in this context include economic conditions, and the nature and implementation of citizenship and fundamental rights.

Finally, in the context of language shift, generally associated with non-official and/or minority languages, it is not often appreciated that both the institutional framework

¹⁴ cf. Green, *supra* note 4.

¹⁵ Alfred P. Rubin, "Are human rights legal?", in Yoram Dinstein and Mala Tabory (eds.), *The Protection of Minorities and Human Rights*, (Dordrecht: Martinus Nijhoff, 1992), 33-58 at 49.

¹⁶ John Edwards, "Language minorities and language maintenance", (1997) 17 *Annual Review of Applied Linguistics*, 30-42 at 35.

of the Community and increased intra-EC trade have also placed smaller *national* languages, such as Danish or Greek, in extremely vulnerable positions, given the spread of the languages of wider communication (lwc's), English and French in the Community context.¹⁷ This idea is discussed separately in a subsequent section but is mentioned at this stage to further highlight the widespread potency of the language planning dilemma at EC level.

3. THE PARTICULAR VALUE OF MINORITY LANGUAGES

The preceding section introduced the principles of diversity, language shift and language planning in a general context. The following paragraphs set out the heightened relevance of these concepts when the languages in question are minority languages. The European Bureau for Lesser Used Languages (EBLUL) has classified the minority languages spoken within the EC into five main groups:

1. the national languages of two Member States which are not official working languages of the EU (*i.e.* Irish and Luxembourgish);
2. languages of communities residing in a single Member State (*e.g.* Breton in France; Welsh in the United Kingdom);
3. languages of communities residing in two or more Member States (*e.g.* Basque in France/Spain; Occitan in France/Italy/Spain);

¹⁷ *cf.* Fishman, *supra* note 3, pp. 368-375; François Grin, "European economic integration and the fate of lesser used languages", (1993) vol. 17:2 *Language Problems and Language Planning*, 101-116; Andrée Tabouret-Keller outlines historical, political and economic constraints on the maintenance of smaller national languages: in "Factors of constraints and freedom in setting a language policy for the European Community: A sociolinguistic perspective", in Coulmas (ed.) *supra* note 1, pp. 45-58; 52-5. Fishman (pp. 374-5) summarises the subtle undercurrents of the smaller national languages question as follows:

It is the special burden of small national languages that they have 'almost made it' into the big leagues...The lives of most small national languages are actually far more precarious, if not beleaguered, than is commonly acknowledged or recognised...However, their frailties do not elicit pity or sympathy, as do those of subnational languages...On the surface, they are full members of the 'gentleman's club' of standardised, national languages. They grace the letterheads of their chiefs of state, the philatelic and ceremonial paperwork of their state apparatuses. But below the surface, there is discontent, some protesting openly that they are used too little and too carelessly and others protesting more discreetly that they are little better than frivolous, expensive and self-deluding games.

4. languages of communities which are minorities in the state in which they live but are the majority languages of other Member States (*e.g.* German in Belgium; Finnish in Sweden);
5. non-territorial languages (*e.g.* Romani, Yiddish).¹⁸

It is estimated that over fifty million, from an approximate total of 365 million European citizens, speak one of these minority languages.

It is also important to establish the context within which minority language issues are being considered throughout this thesis. In summary, it is the perspective of the speakers rather than the survival of the languages *per se* that is prioritised. In addition, the *Euromosaic* Study, undertaken on behalf of the Commission, provides the clearest explanation of the sociological aspect of minority languages:

The concept of minority by reference to language groups does not refer to empirical measures, but rather, to issues of power. That is, they are language groups, conceived of as social groups, marked by a specific language and culture, that exist within wider societies and states but which lack the political, institutional and ideological structures which can guarantee the relevance of those languages for the everyday life of members of such groups. It is this understanding of language by reference to its relationship to the social that allows us to consider the study of minority language groups as a sociological endeavour.¹⁹

This construct, in turn, indicates how minority language issues are affected by the Community's own choices on the structures of its governance, given the impact of the EC on the politics, institutions and ideologies of its constituent Member States.

A. The Principle of Cultural Democracy

Any espousal of the value of linguistic diversity must necessarily include an appreciation of minority languages, in the overall context of cultural democracy. These languages have often persisted in the face of overwhelming assimilative trends. But minority languages, or more specifically their speakers, have also paid a heavy price to regimes of intolerance and injustice, both deliberate and covert.²⁰

¹⁸ European Bureau for Lesser Used Languages, *Unity in Diversity*, 2nd ed., (Dublin: EBLUL, 1996).

¹⁹ *Euromosaic*, *supra* note 6, p. 1.

Walters notes that the suppression of minorities, including linguistic minorities, can produce grave political and constitutional consequences.²¹ This fact has been somewhat forced onto the agenda of both international and regional political organisations in recent years.²²

The traditional response to minority claims has been the blanket guarantee of non-discrimination. This means that a speaker of a minority or non-official language, for example, should not be discriminated against because of the language s/he speaks. The principle of non-discrimination on linguistic grounds is a feature of the broad non-discrimination clauses of most major international human rights instruments.²³ Gromacki describes the non-discrimination thesis as an example of a *negative* right, but he argues that true equality cannot be implemented without a commitment to *positive* action, so that inequalities may be remedied on a more proactive footing.²⁴ Albanese has argued that the application of non-discrimination policy on its own propagates an indifference which he terms "hidden assimilation".²⁵ In addition to claims addressed to domestic governments and international human rights organisations, language groups also focus on the European Community, to seek the positive implementation of a genuine cultural democracy. The legitimacy of these claims - from both the minority and Community perspectives - is analysed in

²⁰ cf. Fishman, *supra* note 3, pp. 562-563.

²¹ David B. Walters, "The legal recognition and protection of language pluralism", (1975) *Acta Juridica*, 305-326 at 305.

²² cf. Patrick Thornberry, "UN support for linguistic minorities", (1993) vol. 10:1 *Contact* 1-2.

²³ e.g. Article 14 - European Convention on Human Rights (1953); Article 2.1 - International Covenant on Civil and Political Rights (1976); Article 2.2 - International Covenant on Economic and Social Rights (1976); Article 2.1 - United Nations Convention on the Rights of the Child (1989).

²⁴ Joseph Gromacki, "The Protection of language rights in international human rights law: A proposed draft declaration of linguistic rights", (1992) 32 *Virginia Journal of International Law*, 515-579; cf. also Francesco Capotorti (UN Special Rapporteur) *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1979); J.A. Sigler, *Minority Rights: A Comparative Analysis*, (Westport, Connecticut: Greenwood Press, 1983); Patrick Thornberry, *International Law and the Rights of Minorities*, (Oxford: Clarendon Press, 1991).

²⁵ Ferdinando Albanese, "Ethnic and linguistic minorities in Europe", (1991) 11 *Yearbook of European Law*, 313-338 at 320; Will Kymlicka, a liberal theorist, also identifies the insufficiency of

subsequent sections of this Chapter. The negative versus positive rights debate is addressed in more detail in Chapter 5 *infra*.

B. The 'Conflict' Focus

As noted earlier, negative connotations have often tainted the perception of minority groups. One particular aspect of this misconception is the presumed causal link between minority groups and conflict. Nelde, for example, argues that ethnic group contact is inevitably tense and inharmonious and will, under certain conditions, result in intense conflict and, possibly, violence.²⁶ Similar views can be detected in the writings of American commentators who fear that granting rights to linguistic minorities would disturb national unity and result in bitter conflict.²⁷ It is also generally assumed that minority-based conflict will lead to claims for independence and secession.²⁸ Nelde applies the conflict reasoning to linguistic groups as follows:

[A] dominant language group...controls power in the areas of administration, politics and economy, and gives employment preference to those applicants who have command of the dominant language. The disadvantaged language group is then left with the choice of renouncing social ambition, assimilating or resisting. While numerically weak or psychologically weakened language groups tend towards assimilation, in modern societies numerically stronger, more homogenous language groups having traditional values, such as their own history and culture, prefer political resistance, the usual form of organised language conflict this century.²⁹

Yet Nelde does not address the evidence so glaringly apparent in his own description of the reasons *why* conflict can occur in linguistic-oriented situations. He states clearly that the dominant language group in this scenario has absolute control over prestigious domains for language use: autonomous language groups, forced into an

the non-discrimination attitude, referring to it as 'benign neglect': cf. *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), Chapters 4 and 6.

²⁶ Peter Hans Nelde, "Language conflicts in multilingual Europe: Prospects for 1993", in Coulmas (ed.) *supra* note 1, 59-74.

²⁷ e.g. Anon, "Language rights and the legal status of English-only laws in the public and private sector", (1992) 20 *North Carolina Central Law Journal* 65-91; Frank Lowrey, "Through the looking glass: Linguistic separatism and national unity", (1992) 41 *Emory Law Journal* 223-319.

²⁸ In this context, Mark Fettes suggests that states might seek "...protective legitimacy within the European Community against internal secessionist tendencies": cf. "Europe's Babylon: Towards a single European language?", (1991) vol. 31:3 *History of European Ideas*, 201-213 at 202.

involuntary alternative of assimilation, are being denied basic, legitimate rights. If conditions were favourable and basic language rights had been granted to the speakers of the minority language, only then could conflict be deemed unreasonable.³⁰ In reality, the very fact of developing a minority rights regime in the first instance indicates a desire to *preserve* rather than deny existing territorial integrity: fairness within existing structures is what is almost invariably proposed. On the contrary, Nelde appears to accept the assimilative climate of unilingualism as a given, without stopping to question its legitimacy. He proceeds to create a very negative impression of the behaviour of members of minority groups when it has been shown empirically, for both historical and contemporary minority situations, that while a diversity-conflict link can certainly develop, it is by no means a *causal* phenomenon.³¹ Thus, while not denying that language related issues can indeed lead to conflict, it must be stressed that focusing on extreme cases and presenting them as the 'norm' is a grossly exaggerated outlook. Finally, Fishman, writing in the context of the USA, argues that it is in fact insecurity which lies at the heart of the conflict thesis. He refers to the "...often groundless fears of majorities that constantly see 'separationists' and 'secessionists' under their beds and in their closets, without appreciating the contribution to pluralism that is dependent upon them and upon them more than upon 'others'."³² Freeman also points to empirical grounds to support the argument that "...well-judged collective-rights policies are *conducive* to peace."³³

²⁹ Nelde, *supra* note 26, pp. 60-61.

³⁰ This view has been expressed by the following commentators: Albanese, *supra* note 25, p.318, who argues that minority groups in this situation feel that only conflict-centred measures can secure their dignity and cultural identity; Richard J. Watts, "Linguistic minorities and language conflict in Europe: Learning from the Swiss experience", in Coulmas (ed.) *supra* note 1, 75-102 at 94; Gregory R. Guy, "International perspectives on linguistic diversity and language rights", (1989) 13 *Language Problems and Language Planning*, 45-53.

³¹ Robert Phillipson and Tove Skutnabb-Kangas, "Linguistic rights and wrongs", (1995) *Applied Linguistics*, 483-504 at 496, quoting Hettne - "The problem is not that ethnic groups are different but rather the problem arises when they are no longer allowed to be different."

³² Fishman, *supra* note 3, p. 180.

³³ Michael Freeman, "Are there collective human rights?", (1995) 43 *Political Studies*, 25-40 at 37, referring to T.R. Gurr, *Minorities at risk: A Global View of Ethnopolitical Conflicts*, (Washington DC: United States Institute of Peace Press, 1993), (emphasis added).

4. THE LANGUAGE POLICY OF THE EUROPEAN COMMUNITY

A. Introduction³⁴

The existing arrangements for language use within the Community institutions are outlined in the following paragraphs: analysis of the practical elements of the official languages policy in this manner reveals the underlying Community ethos on linguistic diversity more generally. There are eleven official and working languages in the European Community: Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish. This language grouping includes at least *one* of the official languages of each Member State. It is presumed that these eleven languages are also the official and working languages of the European Union, since no provision of the Treaty on European Union deals specifically with language.

Tabory outlines the complex procedures, in the linguistic sense, behind the drafting of the Dutch, German and Italian versions from the French original of the Treaty of Rome.³⁵ The co-ordination of terminology required was further complicated by the very innovativeness of the concepts outlined in the Treaties. In addition, differences in domestic legal systems and traditions had to be overcome. The challenge posed by the harmonisation of the translations was, however, a necessary one, because of one crucial phrase in Article 248 EEC: “[t]his Treaty, drawn up in a single original in the Dutch, French, German and Italian languages, *all four texts being equally authentic*, shall be deposited *etc.*” (emphasis added). It is from this relatively obscure reference that the “...federalist, non-hegemonial language formula...”³⁶ of the Community originates, *i.e.* the doctrine of the equality of all of the Community’s official

³⁴ For general information and discussion on Community language policy, *cf.* Coulmas, *supra* note 1; Antoni Milian-Massana, “Le régime linguistique de l’union européenne: Le régime des institutions et l’incidence du droit communautaire sur la mosaïque linguistique européenne”, (1995) 3 *Rivista di Diritto Europeo*, 485-512; John A. Usher, “Languages and the European Union”, in Malcolm Anderson and Eberhard Bort (eds.), *The Frontiers of Europe*, (London: Pinter, 1998), 222-234.

³⁵ Mala Tabory, *Multilingualism in International Law and Institutions*, (Alphen aan den Rijn; Rockville MA: Sijthoff and Noordhoff, 1980), p. 114 *et seq.*

³⁶ Gerhard Leitner, “Europe 1992: A language perspective”, (1991) 15 *Language Problems and Language Planning*, 282-296 at 290.

languages. This innovation remains a unique feature of contemporary EC language policy, which cannot be compared to the linguistic practice of any other international organisation.³⁷ Subsequent enlargements of the European Community have resulted in a corresponding increase in the number of official/working languages, in accordance with the doctrine of linguistic equality.³⁸ The initial Community focus on economic integration, quite restricted in comparison with the contemporary range of European policies, did not provoke any consideration of the linguistic implications of further Community growth, either in terms of Member States or new Community competences. In a Community of six Member States, based upon structures grounded in a new and unique dimension of international law, linguistic issues were not a priority.

Article 217 of the Treaty of Rome allocates responsibility for the linguistic regime of the institutions to the Council: the very first regulation issued by the Council fulfilled that responsibility.³⁹ Article 1 of the Regulation distinguished explicitly between the terms 'working' and 'official' languages, but neither explained this distinction nor provided for its implementation in practice. The Regulation set out guidelines for communications between Member States and Community institutions (Articles 2 and 3); it provided that regulations and other documents of general application must be drafted in *all* of the official languages (Article 4): each language version is considered equally authoritative. Article 5 required the publication of the Official Journal of the Communities in all of the official languages.

³⁷ For example, English and French are the sole official languages of the Council of Europe; Arabic, Chinese, English, French, Russian and Spanish are the official and working languages of the United Nations. Brown notes that the ECSC Treaty had assumed that the French language version only was to be authentic, but that the six Member States established the equality of their four languages (*i.e.* Dutch, French, German and Italian) by a separate Protocol: *cf.* L. Neville Brown, "The European Community: Some problems of interpretation and drafting of plurilingual law", (1988) vol. 13:1 *Holdsworth Law Review*, 16-45 at 16.

³⁸ *cf. infra*, however, on the status of Irish and Luxembourgish.

³⁹ *i.e.* Regulation No. 1/58, 15 April 1958.

For a comprehensive list of all language-related Community legislation, *cf.* Normand Labrie, "La dynamique du français dans la construction européenne", in Claude Truchot (ed.), *La Plurilinguisme Européen: Théories et Pratiques en Politique Linguistique*, (Paris: Honoré Champion, 1994), 245-264.

Article 6 stipulated that the Community institutions may determine internal language regulations in respect of specific administrative practices. The Regulation itself does not elaborate on the compatibility of this procedure with the doctrine of equality of the official languages but it has been provided elsewhere that any internal guidelines introduced by the institutions must comply with the linguistic equality formula.⁴⁰

B. Language Policy of the Community Institutions

The everyday use of language within the institutions of the EC is one of the primary manifestations of the linguistic equality doctrine in practice. The following sections outline the internal language practices of each of the principal institutions. The thematic policies of these institutions on *external* language issues are not detailed at this stage: this aspect of language policy is assessed in Chapters 2 and 6 *infra*. Furthermore, this section deals only with use of the *official* Community languages: the use of minority languages is considered separately *infra*. The particular difficulties posed for the translation and interpretation services of the Community are also considered in a separate section, since they apply in a cross-institutional sense.

(i) European Court of Justice ⁴¹

The Court is subject to the general linguistic guidelines set out in Regulation 1/58 but, according to Article 7 of the Regulation, it may develop autonomous rules in respect of language use for proceedings. Articles 29-31 of the Rules of Procedure of the Court⁴² confirm that the languages of procedure are all of the official EC languages, as well as Irish. Generally, the language of proceedings is selected by the applicant, unless the defendant is a Member State, or a natural or legal person of Member State nationality. In respect of Article 177 EC referrals, the language used in

⁴⁰ cf. Doc. A 3-169/90.

⁴¹ cf. John A. Usher, "Language and the European Court of Justice", (1981) *The International Contract: Law and Finance Review*, 277-286.
It should be noted that the language policy of the European Court of Justice applies to the Court of First Instance also.

⁴² 19 June 1991.

the European Court will be that of the domestic court making the reference. If the domestic proceedings are being heard in a language that is not an official EC language, however, the reference must first be translated into one of the official languages before it is sent to the Court of Justice. Judgments issued by the Court are of legal effect in the language of the case only, but are subsequently translated into and published in the other official languages (except Irish).⁴³ As an illustration of the Court's pragmatic approach to multilingualism, Usher notes that the Court has *not* applied the maxim that 'ignorance of the law is no defence' where there have been delays in the translation of Community legislation.⁴⁴ Similarly, Tabory notes that violation of the language rules will not necessarily invalidate proceedings.⁴⁵

In contrast, the character of judicial deliberations illustrates the divergence between linguistic policy and practice in the day-to-day running of the Community institutions. Since it is required that these deliberations be held in private, the use of interpreters is prohibited, thus requiring the judges to communicate in a common language. The language usually adopted for judicial deliberations is French. Huntington notes that this fact often influences parties when selecting the language of the case, based on the premise that since the judges are likely to understand arguments delivered in French, interpreters would not be needed, thus increasing effectiveness and reducing costs.⁴⁶ In light of the secret nature of judicial deliberations, it is difficult to propose any alternative solution to the internal adoption of a common language. But this practice may operate in a discriminatory manner against judges whose expression in the French language might be somewhat

⁴³ Usher, *supra* note 34, notes, however, that some judgments are published only in the language in which the case was heard: pp. 225-6.

⁴⁴ Usher, *ibid.*, p. 225, referring to Case 160/84 *Oryzomyli Kavallas* [1986] ECR 1633.

⁴⁵ Tabory, *supra* note 35, p. 27, referring to Case No. 1/60 *Acciaieria Ferriera di Roma v. High Authority*, 10-5-1960, 6 *Rec* 351 and Case No. 41/69 *ACF Chemiefarma N.V. v. Commission*, 17-7-1970, 16 *Rec* 661.

⁴⁶ Robert Huntington, "European unity and the Tower of Babel", (1991) 9 *Boston University International Law Journal*, 321-346 at 332.

limited, resulting in a possible loss of potency from their arguments.⁴⁷ This may be exacerbated in the future, due to the rampant spread of the English language as a second language across Europe. In any event, the *de facto* distinction between official and working languages within the Community calls the absolutism of the doctrine of language equality into question, discussed *infra* in the context of doctrinal reform.

(ii) The Council and the Commission

These institutions are bound generally by the guidelines established in Regulation 1/58. In reality, the Council and Commission use French and English as languages of daily communication. German is also used on occasion. The Commission has devised an internal translation and authentication scheme to reflect this pattern of language use, in accordance with Article 6 of the Regulation.⁴⁸ This means that business is often carried out in a reduced number of languages, but the resulting texts are translated into all the official languages and duly authenticated.⁴⁹ This divergence between language policy and language use in the institutions was challenged in *Kik v. Council and Commission*, which related to the language procedure adopted regarding applications for Community trade marks.⁵⁰ Only English, French and German are recognised as official languages in respect of applications made for European patents.⁵¹ But if a European patent is granted, it is then translated into the language of each Member State designated in the application. *Kik* was dismissed on admissibility grounds, because the measure challenged was a general legislative one and, therefore, it was not open to challenge by an individual before the Court of

⁴⁷ See Tabory, *supra* note 35, p. 26.

⁴⁸ *cf.* Commission Decision, 17 February 1993; Milian-Massana, *supra* note 34, pp. 492-3.

⁴⁹ Note, however, that the Court of Justice has annulled a Commission decision on the grounds that the Commission did not adhere to this established authentication procedure in respect of certain texts, and thus infringed the Community's language policy: *cf.* Milian-Massana, *ibid.*

⁵⁰ Case T-107/94, [1995] ECR II-1717; Case C-270/95, [1996] ECR I-1987.

⁵¹ The European patent system does not grant a single patent for all of the EU Member States but grants individual, national patents through a consolidated application procedure: *cf.* "Translations:

Justice. But, as with the character of judicial deliberations, this case highlights yet another instance within the administrative structure of the Community where a pragmatic adjustment to the absolute equality of languages has been employed. Fishman describes the equality of languages doctrine as a heavy price paid within the internal organisation of the Community, "...a price which its own bureaucrats attempt to escape from 'unofficially' for internal and closed EC operations, but for which there is no public 'official' relief."⁵² He acknowledges the need for limitations on language policy at sub-state level and argues that limitations at supra-state level are even more necessary. The main difficulty, however, lies in the association between sovereignty and language, discussed further *infra*.

(iii) The Parliament

Coulmas outlines the special significance of adhering to multilingualism in the European Parliament.⁵³ First, since proceedings of the Parliament are held in public, it provides a unique forum for public discussion on proposals for Community legislation. It is thus imperative that the debates be mutually comprehensible. Second, the Parliament is a democratic, directly-elected body whose members are entitled, on democratic principles, to understand proceedings within the institution. In line with this principle, the Parliament sometimes authorises, in special circumstances, the use and interpretation of languages other than the official Community languages in its forum. Advance notice of an intention to use other languages, which may include minority languages where appropriate, must be given, to enable the appointment of interpretation staff competent in the selected language(s). The Parliament, then, must be considered in a somewhat different light to the other institutions, whose representatives are not directly elected by Member State citizens and who, by their choice of function, are deemed to constitute something of an elite group relative to the Members of the European Parliament. The implications of this construction are discussed *infra*.

Costs and compromise", (1996) vol. 25:3 *Chartered Institute of Patent Agents Journal*, 177-190 at 177.

⁵² Fishman, *supra* note 3, p. 53

C. The Status of Minority Languages in the Community

This section outlines the provision, if any, made for the inclusion of minority languages within the Community's official languages policy, notwithstanding the absence of any provision made in Regulation 1/58 itself. The status of two of the languages, Irish and Luxembourgish, is somewhat different from the other minority languages spoken in the Member States and is examined separately.

(i) The Position of Irish and Luxembourgish

Irish and Luxembourgish are both national languages in their respective Member States but neither has been accorded full status as an official Community language. The Irish language is the national and first official language of Ireland but is not an official language of the European Community.⁵⁴ It does have a quasi-official function, however, in that the texts of all Community treaties have been made available in Irish. It is a working language of the European Court of Justice and the Court of First Instance although it has not been used in proceedings to date. As noted, however, there is no legal obligation on either Court to publish judgments in Irish. The *Official Journal* has, on occasion, been published in Irish, where texts have been of particular importance generally or of special relevance to Irish interests. Irish has also been included in Community language-education programmes, such as *LINGUA* and *SOCRATES*. In addition, documentation issued in Irish, *e.g.* passports and driving licences, is accepted as valid within the Community.

Luxembourgish is the national language, but not an official language, of Luxembourg. It has not been endorsed as a quasi-official language within the Community institutions to a similar extent. It has, however, been included in Community language-education programmes and is mentioned in a number of Community documents as the national language of Luxembourg. Significantly, the

⁵³ Coulmas, *supra* note 1, p. 7.

⁵⁴ The actual decision by the Irish government not to seek official status for Irish on accession to the Community was somewhat controversial: *cf.* M. Ó Ruairc, *Ó Chomhfhargadh go hAontas*, (Dublin: Comhar Teoranta, 1994), pp. 95-97; (1994) 12 *CNAG* (Dublin: Conradh na Gaeilge), pp. 4-5.

Court has recognised the value of Luxembourgish as an element of national identity and has confirmed the legitimacy of related state policy.⁵⁵

(ii) The Status of Minority Languages Generally

Over fifty million European citizens speak a language other than the primary vernacular of the Member State in which they live. These minority languages enjoy varying degrees of recognition and support domestically, from full legal recognition accompanied by practical implementation, to hostility and denial.⁵⁶ They do not enjoy either working or official status in the European Community. Special provisions may be made in court proceedings, however, for speakers of certain minority languages who feel unable to express themselves adequately in any of the official languages.⁵⁷ It is arguable that the Community's virtual dismissal of minority languages from its official language policy contradicts its proclaimed commitment to multilingualism and to the equality of languages. It would not, of course, be practical to include all languages in the language equality policy as it is implemented presently. A reformed Community language policy could, however, take the special position of minority languages and their speakers into account. This argument is developed on moral, political and economic grounds in this Chapter and is tested against the competence of the EC in cultural matters, and in fundamental rights and citizenship, in Chapters 4 and 5 respectively.

D. Implications of Existing Policy for Translation and Interpretation

The general principles governing language use in the institutions have already been outlined. This section looks at the implications, in a cross-institutional sense, for the core services essential to any experiment in multilingualism, those of translation and interpretation. A multinational organisation functioning on the premise of

⁵⁵ Case C-473/93 *Commission v. Luxembourg* [1995] ECR I-3207; this case is discussed in Chapter 6 *infra*.

⁵⁶ *cf.* Appendix I, which sets out the constitutional provisions of the Member States that relate to minority language recognition.

⁵⁷ *cf.* Leitner, *supra* note 36, p. 286.

multilingualism will necessarily have to make arrangements for both the translation of texts and documents and the interpretation of oral speech. The practical demands placed on these services in the EC context are exacerbated by the sheer number of official/working languages involved.

(i) Practical Impact on the Translation and Interpretation Services

As noted in the context of the translation of the Treaties, the co-ordination of several language versions of legal texts is a tremendously difficult process, producing a considerable quantity of printed documents.⁵⁸ The Community translation service has its own Terminology Office, established to harmonise the translation of legal and other subject-specific vocabulary. It has also created a multilingual terminology data-bank.⁵⁹ Furthermore, a major Community research programme on the potential of electronic translation is ongoing.⁶⁰ Interpretation services currently operate on a 'relay system' that necessitates groups or teams of interpreters working together, thus requiring high staff numbers.

Translation and interpretation staff are required to be competent in at least two Community languages. Difficulties often arise, however, due to the highly specialised nature of subject matter involved. The translation of documents in court proceedings is generally the responsibility of the parties involved, but the Court's translation service translates the judgments delivered from the language of the case into the other official languages. The Court does not, however, have its own interpretation staff. Usher observes that 'borrowing' staff from the European Parliament can be problematic, since these interpreters do not usually have legal training.⁶¹ Milian-Massana remarks that the rotating presidency of the EU puts

⁵⁸ The specific problems raised by the interpretation of equally authoritative multilingual legal provisions is examined separately.

⁵⁹ *i.e. EURODICAUTOM.*

⁶⁰ *i.e. EUROTRA*; Usher, *supra* note 34, outlines the difficulties associated with the project to date, pp. 222-3; *cf. also*, Truchot (ed.), *supra* note 39, pp. 389-408.

⁶¹ Usher, *supra* note 41, pp. 281-2.

particular interpretation pressure on smaller Member States.⁶² But perhaps the most controversial aspect of translation and interpretation requirements is the corresponding drain on Community finances. Many critics point out that these services consume approximately 40% of the EC administrative budget, an unacceptable figure which renders impracticable an originally well-intentioned linguistic formula.⁶³ Huntington argues that a Community in which economy and efficiency are the 'first values' is paying too high a price for linguistic peace.⁶⁴ Few acknowledge, however, that the administrative budget of the EC amounts to just 2% of *total* Community expenditure.

(ii) Interpretation of Multilingual Texts

Interpreting several different language versions of a legislative text has serious implications for the uniform application of Community law. Textual discrepancies have to be considered carefully by the European courts, since opting for one interpretation over another can seriously affect the proceedings at hand. The Court has thus been faced with the interpretation of two or more equally authentic but wholly different provisions.⁶⁵ In response to these challenges, the Court has adopted a "...purposive rather than a literal approach to the interpretation of Community legislation."⁶⁶ This means that the Court will attempt to discern the intention behind the legislation in question, so that the most likely interpretation of the disputed term or phrase becomes evident. Though pragmatic in inspiration, some commentators remain sceptical of this practice, arguing that the Court may thus determine that words, in certain instances, cannot be accorded their usual meaning.⁶⁷

⁶² Milian-Massana, *supra* note 34, p. 500.

⁶³ Coulmas, *supra* note 1, argues that additional funding allocated to various minority language projects, such as that given to the EBLUL, should be included in this general figure.

⁶⁴ Huntington, *supra* note 46, p. 325.

⁶⁵ *cf.* Usher, *supra* note 34, pp. 224-232; that all language versions of EC legislation are equally authentic was confirmed by the Court in Case 283/81 *CILFIT* [1982] ECR 3415 at 3430.

⁶⁶ *ibid.*, p. 228; the Court has confirmed the application of this approach: *cf.* Case 61/72 *Mij. PPW International v. Hoofdproduktchap voor Akkerbouwprodukten* [1973] ECR 301.

In her study on multilingual international organisations, Tabory acknowledges that, despite problems of interpretation, the multilingual drafting and interpretation process also has certain advantages.⁶⁸ Both drafting and subsequent translation can require more careful contemplation of the terminology used, resulting in a more considered text than might otherwise have been possible. Moreover, a provision that seems difficult or unclear may be clarified by comparison to another language version, as practised in the European Court. But most importantly, Tabory observes that despite the volume and specialised nature of official texts produced, "...the relatively small number of recorded instances of linguistic discrepancies of significant practical or legal consequence is perhaps surprising and encouraging."⁶⁹ Finally, Brown notes that the actual composition of the Court lends itself to solving potential problems associated with multilingual texts: each Member State is represented by a judge who brings "...knowledge of their own language and law...", a fact reinforced by the employment of advocates general.⁷⁰

(iii) Conclusion

It is obvious that translation and interpretation services in the EC have an enormous workload and are often strained. Indeed, many calls for reform come from those directly involved in the operation of these services. But the introduction of reform should *not* hinge primarily on the costs aspect. Reducing the number of official languages would certainly reduce costs but would necessarily transfer the translation of Community documents and other publications to the individual Member States. This procedure would have serious implications for the uniform application of Community law, given that even the centralised translation of legislation is itself plagued with harmonisation difficulties. In addition, the value of 'linguistic peace' should not be dismissed quite so readily. The EC Member States are diverse. This is

⁶⁷ *cf.* for example, Huntington, *supra* note 46, pp. 334-340.

⁶⁸ Tabory, *supra* note 35, pp. 227-230.

⁶⁹ *ibid.*, p. 227.

⁷⁰ Brown, *supra* note 33, p. 40.

an enduring truth that the abolition of tariffs and customs duties can not and should not overcome. As discussed above, unnecessary conflict can be avoided by ensuring that diversity is both accommodated and respected. The doctrine of equality of Community languages may well have indirectly alleviated potential political crises, since it marks a recognition by the EC of the diversity of the Member States.

Roche, a member of the Commission's interpretation service, advocates a more pragmatic application of the doctrine of linguistic equality.⁷¹ He does not suggest that the present theoretical structure be altered very radically and reaffirms the right to choice of language:

One hears constantly about the handicap suffered by Europe as a result of the language barriers that have to be negotiated within its borders. Envious comparisons are drawn with the situation enjoyed by the Americans and the Japanese. This envy, mainly expressed by people who view the world from a narrow perspective...in turn engenders fear on the part of those who cherish our linguistic diversity that, in an attempt to offset the undoubted economic disadvantage this constitutes, Europe will be tempted to adopt an "if you can't beat 'em, join 'em" attitude and place some kind of restrictions on people's freedom to use the language of their choice....⁷²

Roche proposes instead that those working within the EC institutions, while having full and free choice of language, should recognise the advantages of using a common language where possible, to reduce interpretation requirements. In this way, speakers who are comfortable using another language would do so where this would be advantageous in terms of efficiency. Equally, however, no-one should feel obliged to compromise his/her linguistic expression by being *obliged* to speak another language. This idea is considered further *infra*, when possibilities for an effective overhaul of the present language policy of the Community are examined.

5. THE LANGUAGE DIMENSION OF FUNDAMENTAL COMMUNITY FREEDOMS

⁷¹ Roche, *supra* note 7.

⁷² *ibid.*, p. 140.

The use of language in the institutions of the EC has been described as the primary manifestation in practice of the official languages policy gleaned from Article 248 EEC. Quite apart from this direct association between language and the EC, there is a linguistic dimension to virtually *any* policy initiated at Community level. Thus, as has already been observed, the rippling effect of Community law has innumerable consequences for languages and for their speakers. The converse of this argument is that far more spheres of life are affected by language issues than is usually acknowledged. To illustrate both points, the following paragraphs outline the implications for language use of the implementation of fundamental Community freedoms.

A. Free Movement of Persons

The EC Treaty guarantees the right of all European citizens to move freely among and seek employment within the Member States. It is probable that a worker who has moved from his/her native country to another Member State will also cross language boundaries. The Community has addressed this aspect of free movement from two perspectives: first, by implementing preparatory education programmes to facilitate inter-state movement (*e.g.* *ERASMUS*, *LINGUA* and *SOCRATES*) and second, by dealing with the difficulties that may arise after the citizen has resettled in a new country.

Various language programmes have been established to promote the learning of the official Community languages, *LINGUA* being the most comprehensive.⁷³ Language education is not confined to school and college *curricula*, however: it has also been promoted in the context of continuing adult education. The philosophy behind European Community involvement in language education can be interpreted in two different ways. First, it is arguable that, by ensuring that all the official languages, along with Irish and Luxembourgish, are included in the various education programmes, the Community is confirming its commitment to linguistic diversity

⁷³ *cf.* Jean-Claude Corbeil, "L'Aménagement linguistique en Europe", in Truchot (ed.), *supra* note 39, 409-413.

and to the doctrine of the equality of all the official languages. Alternatively, the promotion of language education can be attributed solely to the functional requirement that free movement of workers be facilitated by widespread linguistic training. It is probable, however, that *both* philosophies have influenced Community action in this field. As a Community policy, the promotion of bilingualism and multilingualism through comprehensive language education receives virtually unanimous support. But whether time and money should be allocated to the promotion of smaller national and minority languages as well as to the languages of wider communication, or in what proportion this allocation should occur, remains a contentious issue.

In the overall context of facilitating the free movement of workers within the EC, particular attention has been directed towards the position of migrant workers, from the perspective of integration into the host state, as well as the facilitation of workers and their families when resettling in their countries of origin.⁷⁴ Cullen traces the evolution of Community policy on the education of children of migrant workers from one of passive assimilation towards the view that mother-tongue education should be provided on cultural and identity grounds; preparation for the eventual reintegration of migrants in their countries of origin has also featured where relevant.⁷⁵ She notes in particular that, while many problems and difficulties still exist in practice, there is "...an orientation much more toward the language of human rights and citizenship..." in the more recent policy measures that have emanated from the EC institutions.⁷⁶ The language rights of migrant workers, through related to language rights generally, are essentially a distinct category requiring a separate approach and are not, therefore, dealt with extensively in this study, which focuses on autochthonous or indigenous language minorities, as noted *supra*.

⁷⁴ For additional reading on the linguistic aspect of EC migration generally, cf. Guus Extra and Ton Vallen, "Migration and multilingualism in Western Europe: A case study of the Netherlands", (1997) 17 *Annual Review of Applied Linguistics*, 151-169.

⁷⁵ Holly Cullen, "From migrants to citizens? European Community policy on intercultural education", (1996) 45 *International and Comparative Law Quarterly*, 109-129.

⁷⁶ *ibid.*, p. 125.

It has been accepted by the European Court of Justice that a foreign national may be susceptible to the language policy requirements of the host state so long as the basic principles of freedom of movement, including proportionality and non-discrimination, have not been breached.⁷⁷ By recognising that a Member State may pursue domestic language planning policies within the limits of fundamental Community principles, the Court has acknowledged the inherent value of linguistic diversity. Moreover, the Court adopted this position *before* the Community was required to respect the cultural diversity of the Member States by Article 128 EC, introduced by the Treaty on European Union. In *Ministere Public v. Mutsch*,⁷⁸ the Court decided that minority language rights granted by a Member State to its nationals must be extended to *all* Community workers resident in that State. The implications for Community language policy that can be derived from *Mutsch* are discussed in Chapter 2; but this case does not require Member States to introduce a minority rights regime *per se*: rather, it demands uniform application where such rights have already been granted. In certain limited circumstances, however, the principle of free movement may result in the granting of linguistic rights to non-nationals over and above those provided for nationals of a Member State.⁷⁹

B. Right of Establishment and Freedom to Provide Services

As with freedom of movement, the implementation of the right of establishment prohibits both direct and indirect discrimination against non-nationals. Essentially, Member States may still impose various linguistic conditions on the exercise of trades and professions, but these requirements must apply equally to both nationals and non-nationals. Language policies are necessarily less relevant to the freedom to

⁷⁷ cf. Case 379/87 *Anita Groener v. Minister for Education and the Dublin Vocational Education Committee* [1989] ECR 3967; [1990] ILRM 335; this case, which centred on requirements of linguistic competence as a precondition to employment, is discussed in detail in Chapter 2 *infra*.

⁷⁸ Case 137/84, [1985] ECR 2681.

⁷⁹ cf. Usher, *supra* note 34, pp. 232-3, *re*: Case 55/77, *Maris v. Rijksdienst voor Werknemerspensioenen*, [1977] ECR 2327; cf. also the recent decision in *Bickel and Franz*, (24 November 1998), discussed in Chapter 6 *infra*.

provide services, since the linguistic competence of the provider is usually assessed at the time of qualification or establishment.

C. Free Movement of Goods

Language considerations have also affected the free movement of goods within the EC. Attention has been focused primarily on the principles of consumer protection, regarding the language used on product labels *etc.*⁸⁰ The jurisprudence of the Court has been based on languages that are 'understood', rather than on the official language(s) of the area under consideration in any particular case. Usher has, however, identified several difficulties with this Community criterion.⁸¹ The Court has reached seemingly contradictory results where it has determined the language(s) appropriate for adequate consumer notification.⁸² This confusion serves to highlight rather than negate the need for a more cohesive Community policy on language issues and language rights.⁸³ It is arguable, however, that the Court has addressed the issue from the perspective of consumer protection, emphasising that consumers should easily understand whatever language is used on labels. This stance focuses on the rights of individuals, over and above more abstract requirements. It is similar, rather than at odds with, the decision of the Court in *Bickel and Franz*, discussed in chapter 6 *infra*, where the Court focused on speakers of the minority language in question rather than on the language itself. In this context, the approach adopted to language and labels does not seem quite so dismissive.

⁸⁰ *cf.* Usher, *supra* note 34, pp. 233-4; see also Milian-Massana, *supra* note 34, pp. 508-509; Case C-51/93 *Meyhui NV v. Schott Ziesel Glaswerke AG* [1994] ECR I-3879, esp. paras. 24-26 of the Advocate General's Opinion.

⁸¹ Usher, *supra* note 34, p. 233.

⁸² *cf.* Christine Boch, "Language protection and free trade: The triumph of the *Homo Mac Donaldus*?", (1998) vol. 4:3 *European Public Law* 379-402; the present position is that consumers do *not* have a right to be informed about products in their *own* language(s); a 'language easily understood' will suffice: *cf.* Case C-85/94 *Peeters II*, [1995] ECR I-2955, esp. para. 15 of the judgment.

⁸³ In a related question, McCarthy and Mercer consider the potential impact on intra-Community trade of domestic laws that impose strict requirements in favour of a national language: *cf.* Niamh McCarthy and Hugh Mercer, "Languages as a barrier to trade: The loi Toubon", (1996) vol. 17:5 *European Competition Law Review*, 308-314.

6. THE IMPACT OF THE EUROPEAN COMMUNITY ON LANGUAGE USE PATTERNS

The assumption that language policy should be a priority in a political entity comprised of diverse Member States is far from realised in the context of the European Community. But it is difficult to see how the Community can side-step its influence on and, therefore, responsibility towards, the linguistic heritage of Europe. Despite the formal equality of the official languages, just one or two languages function as day-to-day vernaculars within the Community institutions. This growth in language unification has inestimable consequences for those languages *not* generally used. Corbeil has predicted that non-intervention by the Community will promote a European language crisis.⁸⁴ The alternative, he argues, must be conscious language planning at both national and European level.⁸⁵

Arguments that the Community did not have competence to formulate language policies were seemingly dispelled by the introduction of Article 128 EC, which provides that "[t]he Community shall contribute to the flowering of cultures of Member States while respecting their national and regional diversity and, at the same time, bringing the common cultural heritage to the fore." Philip argues that Article 128 EC provides a legal foundation for Community involvement in cultural affairs, at least at a level of shared competence: this means that Community policy would supplement national initiatives in accordance with the 'litmus test' of subsidiarity.⁸⁶ In any event, de Witte points out that the Community has developed along a functionalist framework, extending its field of influence into numerous policy areas that were not necessarily mentioned in the Treaty of Rome.⁸⁷ The legal bases for

⁸⁴ Corbeil, *supra* note 73, pp. 411-415.

⁸⁵ Brackeniers, Director General of the Commission's Translation Service, has suggested that European industry should also be involved in language planning: cf. Eduard Brackeniers. "Europe without frontiers and the language challenge", (1991) 3 *Target* 92, 1-2.

⁸⁶ A.B. Philip, "Old policies, new competencies", in A. Duff, J. Pinder and R. Pryce, *Maastricht and Beyond*, (London: Routledge, 1994), 123-139 at 123.

Community language policy is detailed in Chapters 3, 4 and 5 *infra*: in the following paragraphs, the impact of the EC on language use, within its own institutions and throughout the Member States, is outlined. In particular, the responsibility of the Community to formulate counteractive policies is analysed from political, moral and economic perspectives:

A. The Specific Nature of EC Law

European Community law is unique by international standards in that Regulations are directly applicable in each Member State without a requirement of separate domestic implementation. This fact provides strong justification for the translation of all EC legislation into the official Community languages, primarily because it is unacceptable that a citizen is not able to understand the laws by which s/he is bound. Furthermore, it is imperative that the lawmakers *themselves* understand fully the terminology of the legislation enacted. Finally, as already argued, delegating the translation of Community law to each individual Member State creates the risk of non-uniform application, since there would be increased potential for textual divergence within a non-centralised translation process. Coulmas argues that the need for both accountability and precision justifies the present translation regime for *all* legislation and official documents and not just for regulations alone.⁸⁸ In respect of international organisations more generally, obligations are initially imposed on the state parties only. The consequences for individual citizens are thus wholly different. The more limited language policies of other international organisations, such as the United Nations, cannot, then, be highlighted in comparison with the EC. It is noteworthy that, originally, the UN had two working and five official languages: this number was gradually expanded to the current total of six working and official languages. The increase was not supported unanimously. Several delegates despaired the introduction of additional languages into what had been designated as a forum for greater understanding. Tabory has argued that the increases were grounded more in

⁸⁷ Bruno de Witte, "The impact of European Community rules on linguistic policies of the Member States", in Coulmas (ed.), *supra* note 1, 163-178 at 164-165, and "Surviving in Babel? Language rights and European integration", in Dinstein and Tabory (eds.), *supra* note 15, 277-300 at 288-289.

⁸⁸ Coulmas, *supra* note 1, pp. 5-6.

the political than the functional.⁸⁹ But whatever the impetus or ensuing reaction, the fact remains that a minimalist official languages policy did not suffice to meet either the linguistic or political needs of the UN Member States. The Council of Europe does proceed effectively using just two working and official languages but it has far more Member States than the EU: it would thus be impractical for the Council to operate a language policy similar to that of the Community. Moreover, the vastly different nature of the obligations arising from membership of both organisations must be borne in mind.

Overall, the distinct nature of European Community law is one of the most compelling justifications for the doctrine of linguistic equality. The ensuing costs and difficulties of maintaining a complex translation system have necessarily been subordinated to the realisation of an innovative development in international law. The maintenance of linguistic equality for all languages in the sense of *working* languages is, however, quite another matter, discussed *infra*. Furthermore, the imminent expansion of the European Union will undoubtedly call into question the translation at central level of each and every official document, notwithstanding the relative impact on the citizens affected. The translation of official documents into the official languages of the Community does not, however, cater for citizens who do not understand those languages: this issue is also discussed *infra*, in the context of the special position of minority languages.

B. Is Linguistic Uniformity Necessary for 'True' European Unity?

The European Union is based on economic, political and social integration, eroding many distinctions between inherently diverse Member States. Interpreting diversity as the antithesis of unity, it is arguable that a truly united Europe would speak one language, breaking down communicative barriers and eliminating potential misunderstandings. The effects of adopting of a one-language policy, or even a reduced-number language policy, would not be confined to the Community institutions, but would penetrate the everyday lives of all EU citizens, beginning with

mass education programmes promoting the selected language(s). It is doubtful that many vernacular languages could withstand the pressure of 'the' European language, which would inevitably proceed to become associated with economic, political and social advancement. Most commentators who favour this approach advocate that English should become the language of European communication, given its existing position as the second language of the majority of bilingual and multilingual Europeans, its growing role in the Community institutions and its ever-increasing employment as a language of wider communication on a world-wide scale.

But is a monolingual Europe necessarily the key to a united Europe? It is far more likely that the link between uniformity and solidarity is overstated. The adverse consequences of a monolingual Europe far outweigh its dubious potential as a vehicle for greater unity. Language and diversity are contentious issues. Requiring a forced or involuntary linguistic assimilation would in fact threaten rather than fortify European unity. It is doubtful that advocates of a monolingual Europe have considered the consequences of their proposals in terms of what amounts in reality to cultural genocide. It is unacceptable that European citizens be required to pay such a price, depriving Europe of "...all the advantages that its multilingualism and the corresponding cultural diversity have afforded it for millennia."⁹⁰ Instead of simplifying mutual comprehension, unilingual planning would restrict the linguistic expression of European citizens for, at the very least, an entire generation. Those who formulate policies at EC level are themselves bilingual or multilingual and travel abroad frequently, constituting an elite group by any standards. While this may be the life experience of a growing number of Europeans, it is not the typical one. Moreover, policy formulators have *chosen* their occupations and accepted the resulting linguistic conditions. Reforming the EC language policy without serious consideration of the implications for speakers of languages other than those of wider communication may be justifiable, in economic and pragmatic terms, for the

⁸⁹ Tabory, *supra* note 35, pp. 39-40.

⁹⁰ Roland Posner, "Society, civilisation, mentality: Prolegomena to a language policy for Europe", in Coulmas (ed.), *supra* note 1, 121-138 at 130; cf. also, Joseph Raz, "Multiculturalism", (1994) *Dissent* 67-79.

bilingual Community policy maker, but the situation appears quite differently to speakers of Greek or Welsh.

As an alternative to absolute monolingualism, the concept of selective multilingualism or 'diglossia' is sometimes proposed as an alternative.⁹¹ Diglossia refers to an organised distribution or hierarchy of languages. Vernacular languages are retained for traditional 'home and hearth' functions *i.e.* for personal interaction between family and friends and for limited local functions. The languages of wider communication are then allocated for specifically defined 'outside' functions in the political and economic domains. More specifically in the present context, the selected language(s) of wider communication would be assigned to any domain of language use related to Community activity. Fishman argues strongly that, from a sociolinguistic perspective, diglossia can be a completely stable condition, referring to the example of the control of Dutch/English functions in The Netherlands. He also surmises that English is an ideologically neutral choice as a language of wider communication. But several of the arguments advancing diglossia are fundamentally flawed, particularly in the context of multilingual Europe. First, it is generally argued that diglossia works where the allocation of functions is specific and, in particular, cushioned by the protection of national boundaries.⁹² The explicit regulation or covert promotion of unilingual policies at supra-national level means, however, that the allocation of language functions is beyond the control of the language group concerned. Furthermore, the very nature of the European Union seeks to diminish the validity of national boundaries. It is naive to assume that the dynamics of language can be neatly allocated and controlled: the rampant spread of English throughout an originally Irish-speaking Ireland is illustrative of how a socially prestigious language of wider communication can virtually displace a vernacular language.⁹³ Fishman's

⁹¹ *cf.* Fishman, *supra* note 3, especially p. 177 *et seq.*; Haarmann *supra* note 9; also Haarmann, "Monolingualism vs. selective multilingualism: On the alternatives for Europe as it integrates in the 1990s", (1991) 5 *Sociolinguistica* 7-23.

⁹² Fishman, *ibid.*, pp. 225-226.

⁹³ *cf.* generally Máirtín Ó Murchú, *The Irish Language*, (Dublin: Department of Foreign Affairs, in association with Bord na Gaeilge, 1985); Brian Ó Cuív, (ed.), *A View of the Irish Language*, (Dublin:

reference to the Dutch situation is somewhat confusing in terms of language functions. He notes that exposure to English is widespread in schools and the mass media, yet states also that control of popular culture is an essential element of the stability of diglossia. Surely contemporary popular culture is largely indistinguishable from the mass media? The argument that English is ideologically neutral is contradicted by Fishman himself, where he alludes subsequently to its associations with imperialism.⁹⁴ Fishman does concede that under certain conditions, diglossia *can* go wrong, where it marks the first stage of language shift. In these circumstances, the increased status and utility of the language of wider communication first competes with but subsequently erodes the functions allocated originally to the vernacular.⁹⁵ But it is misleading to consider this development as the exception rather than the rule. The acute concern felt by speakers of minority languages and smaller national languages confirms this truth and dispels the notion that the citizens of Europe are prepared to simply give up their languages. Unity has a far better chance of being realised if this fact is accepted and accommodated rather than challenged. Stable diglossic bilingualism must be desired, not imposed or perceived as a burden.⁹⁶

The relevance of uniformity to effective integration is also linked to discussions on ethnicity and the influence of nationalism. An assessment of the impact of nationalism on the Member States' capacity to unite successfully in a genuine union reveals once again a sharp divergence of viewpoint between the 'realists' and the 'sentimentalists'. There is a strong body of opinion that suggests an irreconcilable conflict between nationalism, particularly the potent variant of linguistic nationalism, and integration. The degree of intensity with which this view is expressed is similarly

Stationery Office, 1969) and J.J. Lee, *Ireland 1912-1985: Politics and Society*, (Cambridge: University Press, 1989).

⁹⁴ Fishman, *supra* note 3, pp. 242-254.

⁹⁵ *ibid.*, p. 392.

⁹⁶ cf. JA Laponce, "Reducing the tensions resulting from language contacts: Personal or territorial solutions?", in David Schneiderman (ed.), *Language and the State: The Law and Politic of Identity*, (Quebec: Les Éditions Yvon Blais, 1989), 173-9.

varied. Describing the Canadian experience of federalism, Strain writes that ethnic or nationalist attachment poses difficulties for political and economic integration.⁹⁷ He thus reasons that the heightened sense of national loyalty exhibited by most Europeans inhibits true European unity. Haarmann argues that any debate on pragmatic reforms of European language policy is usually hindered by the prevalence of nostalgic, language-related national identities, since it is realised by most participants that renunciation of national identity in the European forum would be “...tantamount to political suicide.”⁹⁸ Contempt for nationalism *per se* provokes a more hostile tone. For example, Coulmas advocates the rejection of linguistic nationalism, which he terms “...the ideological dead-weight of the nineteenth century...”, so that a European identity might be forged.⁹⁹ But defining nationalism as a concept by its extreme, fundamentalist form only is an exaggeration and a misleading exercise. To relegate nationalism to the past is to succumb to a basic pitfall of definition, since nationalist theory does *not* usually advocate a return to the past. Instead, the essence of nationalism promotes a confident approach to the future that harnesses positive ideology, generated in the past but adapted to contemporary reality. It is abuse and distortion of this essence that leads to extreme, outdated manifestations of nationalism. The notion that the nation-state might one day ‘wither-away’ has not been realised despite the deepening force of European integration. De Witte observes that the European Union has proceeded “...not so much against the existing states, but on their initiative and with their active support.”¹⁰⁰ In fact, Fishman argues that there is a causal link between economic development and heightened nationalism, since modern nationalism represents “...a tendency to emphasise differences in the midst of a common movement toward similar institutions and modes of existence.”¹⁰¹ Like language attachments,

⁹⁷ J. Frank Strain, *Integration, Federalism and Cohesion in the EC: Lessons from Canada*, (Dublin: The Economic and Social Research Institute, 1993).

⁹⁸ Haarmann, *supra* note 9, pp. 109-110.

⁹⁹ Coulmas, *supra* note 1, p. 27.

¹⁰⁰ de Witte in Coulmas (ed.), *supra* note 87, p. 277.

nationalist feelings cannot be explained rationally and are thus ridiculed by those who cannot contemplate concepts that defy orderly scientific categorisation.¹⁰² Ironically, "...little of the past decade's 'rebirth of ethnicity' has involved *nation-ism*...",¹⁰³ in the sense that "...nationalism and the drive to preserve identities are strong forces and they apply in equal measure...to minorities."¹⁰⁴ This truth requires a reassessment of the presumed link between nationalist sentiment and territorial ambition. In the context of smaller national and minority languages, linguistic nationalism is often an ideological defence in the absence of comprehensive, effective language policies within an existing polity and has nothing whatsoever to do with the establishment of a separate state.

Nationalist and linguistic attachments affect human experience in a profound way which, in turn, affects the structure of both national and European society. Southall recognised this truth in 1893, but his observations remain surprisingly accurate today:

Modern life is supposed to tend to break down all the barriers of nationality, of race and even of language, and to weld the nations of the earth into one mighty mass. That something like this may not be witnessed in a future stage of the world's history I am not prepared to deny....However...side by side with the levelling tendency which annihilates distinctions and which would have one law, one language, one cosmopolitan character throughout...there is a counter tendency of a natural and involuntary character constantly emphasising distinctions and building up local differences, tending to make languages.¹⁰⁵

The arguments advanced against the promotion of unilingualism, the stability of selected multilingualism (diglossia) and the automatic disregard of 'sentimental' attachments have one common basis *i.e.* that language choices should never be imposed from the top-down against the will of individual speakers. Rather, a

¹⁰¹ Fishman, *supra* note 3, p. 152.

¹⁰² cf. David Miller, "In defence of nationality", (1993) vol. 10:1 *Journal of Applied Philosophy*, 3-16; Fishman, *ibid.*, describes the scientific approach to inherently human phenomena as the "...[Western] penchant for demystification..." (pp. 699-700).

¹⁰³ Fishman, *ibid.*, pp. 38-9 (emphasis added).

¹⁰⁴ Gudmundur Alfredson, "Minority rights and democracy", (Discussion paper presented at 3rd Strasbourg Conference on Parliamentary Democracy, September 1991), 85-101 at 98.

governing polity, at whatever level, must accommodate the language choices of its citizens. This position is, essentially, the central theme of this thesis. It veers away from the traditional focus on the status of languages *per se* and is directed towards the fundamental rights of language speakers. It is fully recognised that language policy must always be injected with a healthy dose of pragmatism, but never at the expense of effectiveness. The practical manifestation of this argument is set out more clearly at the end of this Chapter, where reforms of the present EC language policy are proposed, and throughout the thesis in the contexts of legal competence, culture and fundamental rights. What must be stressed at this stage, however, is that supra-national government has as much a role to play in the reorganisation of diglossic structures as national government, as explained by the Commission, in the *Euromosaic* study:

[W]hat is at stake is the relationship between the state and civil society. The family and community are located in civil society whereas the legitimisation forces, education and the media, tend to be state controlled. Without the integration of both levels it is difficult to envisage a future for minority language groups. However, history tells us that the goal of the state has nearly always involved the integration of civil society through the homogenisation of cultural and linguistic elements. It is our claim that the future, in contrast, must involve a reorientation of that integration within the context of diversity and that the emergence of the supra-state affords an important opportunity to realise this goal.¹⁰⁶

Another argument often advanced for the promotion of one language or a reduced number of languages is that of the limited contemporary utility of minority languages, in terms of evolution of vocabulary: these languages simply cannot, for example, cope with technological innovations. But the origin of this reasoning is rooted firmly in historical attitudes and not in linguistic fact:

The link to language rested on an argument which claimed that some languages were the languages of reason whereas others, somehow, lay outside of reason. Thus, the languages of reason, that is, the state languages, the 'modern' languages, were to be deployed in pursuing 'modern' activities demanding the essence of reason - administration, education, science. The other languages could be deployed for the emotive context of the 'traditional'.¹⁰⁷

¹⁰⁵ J.E. Southall, *Wales and her Language*, (1893), quoted by Fishman, *supra* note 3, pp. 314-315.

¹⁰⁶ *Euromosaic*, *supra* note 6, p. 13.

¹⁰⁷ *ibid.*, p. 3.

In this historical context lie the roots of diglossia. But if sociolinguistics as a discipline has taught us anything, "[it] has been to eliminate the idea...that some languages or dialects are inherently 'better than others'."¹⁰⁸ Accordingly, there is no linguistic reason why corpus planning cannot secure the evolution of any language.

C. The Sovereignty Dimension

Closely linked to the issue of nationalism from, in a sense, a parallel perspective, this section assesses the impact of state sovereignty on the EC official languages policy.¹⁰⁹ Modern international law has eroded the traditional concept of state sovereignty to a remarkable extent. States have gradually become more accepting of the external role played by international organisations in certain areas of their domestic affairs. But alongside the cession of sovereignty, a counter tendency to maintain distinct internal characteristics is much in evidence. The degree of political sensitivity surrounding the equality of the Community languages is illustrative of this dynamic. It is sometimes argued that the political sanctification of the present EC language policy is, however, counterproductive. This stance is usually adopted by those seeking a reduction in the number of official Community languages, based on considerations of economics and efficiency. They argue that politics should not hinder pragmatism. Certainly, where promotion of national differences masquerades as chauvinism, the resulting abuse of Community language arrangements cannot be excused. But in the absence of bad faith, respect for diversity must sometimes transcend the requirements of economic efficiency.

Alternatively, it is arguable that resisting a change in language policy for political reasons perpetuates the *inequality* of the Community languages, and hinders especially the development of a comprehensive Community perspective on non-

¹⁰⁸ R.A. Hudson, *Sociolinguistics*, (Cambridge: Cambridge University Press, 1980), p.191.

¹⁰⁹ For further reading on the question of national identity v. European unity more generally, cf. Anthony D. Smith, "National identity and the idea of European unity", (1992) vol. 68:1 *International Affairs* 55-76; Richard Münch, "Between nation-state, regionalism and world society: The European integration process", (1996) vol. 34:3 *Journal of Common Market Studies* 379-401; cf. also Chapter 3 *infra*, on legal competence and the principle of subsidiarity.

official European languages. At a practical level, some official languages *are* more equal than others, since just one or two often fulfil communicative requirements within the institutions. An abstract commitment to the equality of the official languages has not been enough to secure their equality in real terms. Contemplation of real equality must first, therefore, be based on an appreciation of the different status positions of the languages of Europe, both official and non-official: this philosophy informs the paragraphs on language policy reform at the end of this Chapter.

Ironically, it is strict deference to sovereignty in language matters that can sometimes operate to exclude from the principle of multilingualism those languages *not* officially recognised by the EC. Member State attachment to national languages propagates the Community's respect for multilingualism. Yet Coulmas argues that it is precisely the fervour with which the national or official language of a country is promoted that often precludes domestic recognition of minority languages.¹¹⁰ Haarmann uses this fact to further deplore the national language/identity link, since Community multilingualism has, therefore, been conceived from the suppression of minority languages.¹¹¹ But, as shown in Chapters 2 and 6 *infra*, Community multilingualism has taken on a direction of its own, clearly distinguishable from the various approaches of the Member States and with promising signs that the EC may yet be prepared to tackle minority language issues. Smith describes the location of the 'European project' in this context as lying "...between national revival and global cultural aspirations."¹¹² Furthermore, while state sovereignty may have been more problematic in the absence of Community competence in cultural issues, Article 128 EC, as well as other legal bases examined at a later stage, may yet transcend these

¹¹⁰ Coulmas, *supra* note 1, p. 14; the non-recognition of minority languages in France (*e.g.* Breton, Occitan) taken together with the existence of stringent legislative provisions to promote the French language is illustrative of this point: *cf.* Appendix I.

¹¹¹ Haarmann, *supra* note 9, pp. 105-106.

¹¹² Smith, *supra* note 109, p. 67.

concerns: the respective competence of the EC and the Member States in this regard is analysed in Chapter 3.

Overall, given the current socio-political climate and the recent backlash against over-ambitious plans for enhanced European integration, unity will be achieved far more effectively by accommodating national differences, at least in linguistic terms, since “[p]eople from different national groups will only share an allegiance to the larger polity if they see it as the context within which their national identity is nurtured rather than subordinated.”¹¹³ Howe puts forward a relatively naive thesis, arguing that nationalist groupings will succumb to integrative forces in two main stages. First, in the belief that European unity does not require the surrender of separate identity, he argues that such groups will attach, somewhat conversely, a sense of security to the idea of ‘Europeanness’ (e.g. more favourable to be ‘Basque in Europe’ than ‘Basque in Spain’). He then argues that “...despite the undeniable strength of old nations, despite a vigilant public unwilling to allow governments to follow their own integration agendas...these national communities themselves may, after weighing the costs and benefits, not be averse to the idea of further integration.”¹¹⁴ Howe has failed to establish, however, an *inherent* link between further integration, to whatever extent or extreme, and the surrender of identities. Neither has he shown how a change in the fundamental character of the first stage could still evolve to the second stage: the predicted acquiescence towards more intensified integration would probably *not* occur where any perceived threat to identity became apparent, a crucial factor in the first stage of Howe’s thesis; it is far from certain that any grouping would be prepared to let go of the very guarantees that generated the aforementioned sense of security in the first place. The reality is that shared national/European loyalties is a far more realistic expectation than an outright European solidarity with no room for any other group or characteristic-based (e.g.

¹¹³ Kymlicka, *supra* note 25, p. 189.

¹¹⁴ Paul Howe, “A community of Europeans: The requisite underpinnings”, (1995) vol. 33:1 *Journal of Common Market Studies*, 27-46 at 37.

language) sense of identity.¹¹⁵ In short, "...[c]onceptions of 'us' and 'them' will remain, the issue is one of harnessing them within a new sense of integration."¹¹⁶

D. Issues of Democracy and Citizenship

As noted, one of the most compelling arguments for the maintenance of the equality of the Community languages is that European citizens should be able to understand legislation enacted at EC level. This is a key feature of the Community's appreciation of and respect for democracy, strengthened by the introduction of EU citizenship via the Treaty on European Union. Habermas notes that to ensure the implementation of these rights in real terms, recognition of citizens must encompass the integrity of their varied identity-forming contexts.¹¹⁷ Language has already been presented as a potent constituent of human identity. The implications of European citizenship for the development of an EC language policy are, therefore, considerable and are discussed in detail in Chapter 5 *infra* in the context of fundamental rights: at this stage, however, some preliminary observations can be made.

The recognition of language rights as fundamental rights, as well as the Community's intensifying involvement in human rights issues generally, strengthens the argument that EC language policy will have to be influenced by the needs of its citizens. Zuanelli sees a somewhat secondary role for the Community in this context: she argues that international intervention in language issues should establish a threshold for language rights, which should then be implemented by the individual Member States in accordance with their domestic language policies.¹¹⁸ This approach conforms with the role envisaged for the Community in accordance with both the

¹¹⁵ cf. for example, William Wallace, "Introduction: The dynamics of European integration", in Wallace (ed.), *The Dynamics of European Integration*, (London; New York: Pinter, 1990), 1-24; Kymlicka, *supra* note 25, p. 189.

¹¹⁶ Euromosaic, *supra* note 6, p. 54.

¹¹⁷ Jurgen Habermas, "Struggles for recognition in constitutional states", (1993) vol. 1:2 *European Journal of Philosophy*, 128-155 at 132; cf. also, Habermas, "Citizenship and national identity: Some reflections on the future of Europe", (1992) vol. 12:1 *Praxis International*, 1-19.

¹¹⁸ Zuanelli, *supra* note 12, p. 287.

principle of subsidiarity (*cf.* Chapter 3) and the restricted powers of the EC in cultural affairs (*cf.* Chapter 4). But it is unlikely that confining the Community's capacity to act as co-ordinator alone will fulfil *all* of its obligations in the context of citizens' rights, as discussed in Chapter 5 *infra*.

The situation of minority rights within liberal democratic theory raises a particular and inherent irony, in that it is more often than not the majoritarian aspect of democratic rule that causes marginalisation of minority groups in the first instance. Arington has documented an especially injurious trend in the USA, relating to referenda initiated to introduce 'English-only' amendments in certain states, which have succeeded on the 'majority rules' tenet.¹¹⁹ The accommodation of justice for minorities into liberal democratic theory is a fundamental development in contemporary jurisprudence, fuelling the construction of various models for liberal multiculturalism, such as those put forward by Kymlicka and Raz.¹²⁰ Raz reconstructs the outdated majority-minority thesis as follows:

There is no room for talk of a minority problem or of a majority tolerating the minorities. A political society...consists - if it is multicultural - of diverse communities and belongs to none of them. Although the relative size of the different communities affects the solutions to conflicts over resources and public spaces among them, none of them should be allowed to see the [polity] as its own, or to think that the others enjoy their standing on sufferance.¹²¹

By addressing the minorities issue in the context of its own governance, the EC is participating in one of the primary jurisprudential challenges of modern times, a theoretical dilemma with immense practical implications, whether viewed from the perspective of utopian idealism or the prevention of outright conflict, or from any point in between these extremities.

E. Economic Considerations¹²²

¹¹⁹ Michele Arington, "English-only laws and direct legislation: The battle in the States over language minority rights", (1991) 7 *Journal of Law and Politics*, 325-352.

¹²⁰ Kymlicka, *supra* note 25; Raz, *supra* note 90.

¹²¹ Raz, *ibid.*, p. 69.

Quite apart from the costs of multilingualism *per se*, already discussed, the economic aspects of language are frequently debated in the European context. Language choice can be portrayed within a metaphorical marketplace, where different languages compete with each other in terms of usage and where consumption of minority languages is far more costly than that of languages of wider communication. But choice of language can also affect, and be affected by, actual economic variables. Grin argues that increased intra-EC trade will accentuate the status of the *de facto* working languages within the Community, thus reducing the viability of maintaining smaller national and non-official languages.¹²³ This process will surely accelerate with monetary union and is one of the most obvious and potent examples of how the EC impacts on language use patterns throughout the Member States. De Witte analyses these arguments in the context of EC rules on trade and competition.¹²⁴ Given the diminished competitiveness of smaller, more peripheral languages on the cultural market, de Witte considers whether it would be appropriate for the Community to rectify the situation in the form of subsidies, introducing the idea that the Community should intervene in order to remedy or compensate for linguistic damage caused by the dynamics of the EC itself. While not ruling out compensatory intervention under other guises, de Witte doubts the feasibility of actual linguistic subsidies, since there is no grounding framework in the Treaties; in fact, he argues that such measures might actually contradict EC competition principles. It is far from clear, however, what exactly de Witte means by the term 'linguistic subsidies', which makes it difficult to assess the legitimacy of his dismissing their incorporation into EC language policy more generally. De Witte goes on, in any event, to consider instead whether support given to languages by individual Member States is permissible under competition rules. Given the wording of Article 92 of the Treaty of Rome, which provides that impermissible state aid affects *trade* between Member

¹²² cf. generally François Grin and François Vaillancourt, "The economics of multilingualism: Overview and analytical framework", (1997) 17 *Annual Review of Applied Linguistics*, 43-65.

¹²³ Grin, *supra* note 17; cf. also M. Mourik, "European cultural co-operation", in A. Rijksbaron, W.H. Roobol and M. Weisglas, *Europe from a Cultural Perspective: Historiography and Perspective*, (The Hague: Nijgh en von Ditmar Universitair, 1987), 19-21.

¹²⁴ De Witte, *supra* note 87.

States, it is unlikely that language support would be seen as inherently suspect. His prediction was in fact confirmed by the introduction of Article 92(3)(d) EC by the Treaty on European Union, which provides that "...aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest..." is compatible with the common market. The ethos behind EC intervention against unfair competition practices can also be extended to language issues, in that "...arbitrariness of power must be opposed in the ethnolinguistic arena just as it must be opposed in the political and economic realms of which the EC is apparently more aware."¹²⁵ The related issue of extending regional policy to cover minority language issues is discussed separately below.

In another perspective on corrective intervention, Coulmas advocates that the perception of language issues in the Community should be "...ridded of ideological cobwebs..." and understood in a purely economic sense.¹²⁶ Although the tone of this argument is similar to criticisms of the 'human' dimension of what is nevertheless an inherently human issue, Coulmas makes a valid observation by highlighting the considerable economic advantages enjoyed when Member States promote instruction in their languages of wider communication, citing the huge economic benefits gained by the United Kingdom from the 'English as a Foreign Language' (EFL) programmes. He contrasts this with the negligible economic value of the smaller national languages and, in this way, outlines once again the idea of compensatory or redistributive policies. Overall, he considers that viewing language within a strictly economic framework is far more in keeping with the objectives of the EC. He does not allude, however, to the ever-evolving nature of those objectives. Nicoll and Salmon affirm that the "...motivation of [the EC founding fathers] was not the price of eggs, bacon or steel, but rather a revolution in international behaviour."¹²⁷

¹²⁵ Fishman, "On the limits of ethnolinguistic democracy", in Tove Skutnabb-Kangas and Robert Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination*, (Berlin; New York: Mouton de Gruyter, 1994), 49-61 at 61.

¹²⁶ Coulmas, *supra* note 1, pp. 22-26.

Excessive reliance on economic objectives is both artificial and prohibitive in the context of Community evolution.

The contribution that multilingualism can potentially make to the prosperity of the EC in economic terms is regularly overlooked, if not dismissed. The traditional assumptions that monolingualism is preferable for the encouragement of economic growth and that multilingualism is linked causally to poverty have been empirically disproved.¹²⁸ The *Euromosaic* Report, initiated by the European Commission, is the first study to investigate the economic dimension of minority language situations within the EC.¹²⁹ In that study, the empirical findings link diversity clearly to economic *development* rather than disadvantage.

F. The Special Position of Minority Languages

Roche interprets the contemporary situation of European minority languages as follows:

[I]n an EC context, practical convenience should be the major priority and, as such, would normally preclude the addition of...minority languages to our services' client list. Such artificial means of support are surely not needed for languages which are generally considered to be thriving and are doing so because they fulfil a need on the part of their practitioners. Since they are clearly not in need of a life-support machine at an EC level, there is no point clogging up the arteries of the EC body politic unnecessarily through their inclusion...Two minority languages...Irish and Welsh, are currently flourishing because there is spontaneous demand and provision for their use which has no coercive associations.¹³⁰

This diagnosis is, however, overly-optimistic. Roche is confusing a 'flourishing' awareness of the urgent need to implement language rights with the actual state of the minority languages: his naive assumption that 'all is well' contradicts most other

¹²⁷ W. Nicoll and T.L. Salmon, *Understanding the New European Community*, (New York; London: Harvester Wheatsheaf, 1994), p. 318.

¹²⁸ cf. Skutnabb-Kangas and Phillipson, *supra* note 31, p. 495, who refer to an empirical study of over 120 states undertaken by Fishman.

¹²⁹ *Euromosaic*, *supra* note 19.

¹³⁰ Roche, *supra* note 7, pp. 144-145.

opinion on the subject, detailed throughout this chapter, and cannot be considered authoritative.

Analysis of EC involvement in minority language issues can be approached from two perspectives. First, notwithstanding the cultural significance of linguistic diversity *per se* and, in particular, the distinct contribution of minority languages, why should minority concerns feature specifically in *Community* language policy? Second, given that, to date, EC intervention in minority language concerns has been largely peripheral and not legally binding, why do minority language groups continue to attach great significance to the potential of the Community in this area? For example, speakers of minority languages tend to place considerable faith in the formulation of EC language policy over and above any human rights developments under the auspices of the Council of Europe.¹³¹

The present Community regime of official languages has not stabilised the position of smaller official languages against the increasing strength of French and English as languages of wider communication, even though these languages are, in theory at least, full participants in that regime. It thus follows that the non-official, minority languages spoken within the Community are in a far more precarious position. The EC's commitment to the promotion to linguistic diversity should, in itself, require that minority languages must feature in any development of current policy. This reasoning is strengthened by consideration of the following arguments.

The idea that 'languages will take care of themselves' has already been discounted in the Community context. Open market forces in the linguistic sense threaten cultural diversity to an unacceptable extent. This truth is even more relevant for minority languages: they are subject to varying degrees of domestic protection, or indeed

¹³¹ The Council of Europe introduced the European Charter for Regional or Minority Languages in 1993; it places emphasis on state duty in respect of minority languages rather than on the rights of the speakers themselves, and commentators are divided on its potential effectiveness for this reason: cf. Albanese, *supra* note 25, pp. 326-338; Niamh Nic Shuibhne, "The impact of European law on linguistic diversity", (1996) vol. 5:1 *Irish Journal of European Law* 62-80; the provisions of the Charter are discussed in Chapter 5 *infra*.

rejection, in the internal policies of the Member States and have not yet been placed within a co-ordinated legal framework at EC level. Where language is considered in 'market' terms, it should be remembered that since a state or other governing entity endorses a particular language or languages in so many ways, from its administrative system to road signs, "[t]he supposition of a linguistic *free* market is patently mythical."¹³² Watts argues that the "...crass differences in economic strength..." between official and minority languages require far more than an *ad hoc* or *laissez-faire* approach.¹³³ The allocation of resources as 'compensation', discussed above, is certainly applicable to minority languages. In fact, the granting of subsidies by Member States in the minority language context is already more widespread than in respect of languages generally and is more justifiable in the moral sense. De Witte argues that the allocation of funds to minority language publishing, for example, is extremely unlikely to affect the balance of trade between Member States, since it is essentially a domestic market.¹³⁴ These subsidies are not likely, therefore, to infringe Article 92(3)(e) EC.

The compensation thesis takes on yet another dimension in the domain of minority languages: it is often argued that minority language claims have particular relevance in light of EC regional policy. De Witte describes support in this context as "[positive] incentives...to give [minority] languages a fair chance on the 'cultural market'."¹³⁵ He observes that such incentives amount to EC acceptance of the legitimacy of domestic support for minority languages under Article 92 EC, as well as constituting direct support from the Community budget. But there are certain difficulties with a minority languages framework grounded *entirely* on regional policy. In a report commissioned by the EC Commission, the Istituto della Enciclopedia Italiana warns against viewing regional-based policies as mere

¹³² Nathan Brett, "Language laws and collective rights", (1991) vol. 4:2 *Canadian Journal of Law and Jurisprudence*, 347-360 at 349 (emphasis added).

¹³³ Watts, *supra* note 30, p. 78.

¹³⁴ De Witte, in Coulmas (ed.), *supra* note 87, p. 173.

¹³⁵ *ibid.*, p. 174

concessionary measures, thus not appreciating their independent justification.¹³⁶ Furthermore, it has already been argued that language policy which is not grounded in moral argument is necessarily dependent on political discretion for its existence and thus also for its continuance. Placing minority language policy within the framework of EC regional policy would leave it open to amendment or even annulment at the political level. It should also be remembered that not all minority language groups are concentrated in geographical regions.¹³⁷ Strict application of regional criteria could thus exclude legitimate minority language groups from support derived on the regional policy basis. Ó Riagáin remains sceptical of the extended application of regional policy to date, arguing that this "...rhetoric of another EC tendency...which seeks to compensate against the inevitable centripetal processes of the common market itself..." falls well short of the development of a comprehensive, independent policy on minority languages.¹³⁸ But what remains essential is that it must be within rather than outside the structure of the EC that solutions to the 'problem of peripheralism' are sought:

While there have been numerous attempts to resolve the problem of peripheralism, current thinking along these lines has to come to terms with the political and economic context by reference to which that resolution must conform. The Single Market exists and it is within that context that the solution must be found.¹³⁹

Questions on the legal competence of the EC in language issues have been relieved but not dispelled by the introduction of Article 128 EC, as discussed in Chapter 4 *infra*. Difficulties may ensue from the ambiguous wording of Article 128 itself, as well as in the potential application of the principle of subsidiarity. But minority languages are an equal contributor to the cultural diversity of the Member States and,

¹³⁶ Istituto della Enciclopedia Italiana, *Linguistic Minorities in Countries belonging to the EC*, (Luxembourg: Office for Official Publications of the European Communities, 1986), p. 234.

¹³⁷ Speakers of the Irish language, for example, are dispersed throughout the country; certain geographical areas, known as 'Gaeltachtaí' and located primarily in the West of Ireland, are concentrated in terms of speakers, but the increasing strength of the language in more widespread, particularly urban, areas must also be taken into consideration in any language policy.

¹³⁸ Ó Riagáin, *supra* note 2, p. 271.

¹³⁹ Euromosaic, *supra* note 6, p. 49.

as such, ought to come within the ambit of EC competence as much as their official counterparts. McCarthy and Mercer have interpreted Article 128 somewhat differently, however, arguing that since the EC must respect the national and regional diversity of the Member States, cultural protection policies are in the domain of domestic competence alone.¹⁴⁰ This construction is somewhat contrived, however, and goes against the plain words of the Article. A provision that requires the EC to bring the 'cultural heritage of Europe to the fore' must surely necessitate respect for diversity in *that* context itself: diversity is as much, if not more so, an element of European cultural heritage as it is of domestic cultural heritage. The correct interpretation of the principle of subsidiarity, set out in detail in Chapter 3 *infra*, is also relevant. Meade proposes the following pragmatic interpretation: "...in the ascending hierarchy of authorities...anything which can be done well at a lower level should be left to that level and only those things which cannot be done well at the lower level should be assigned to decision and administration by a higher level of authority."¹⁴¹ National policy on minority languages is extremely varied across the Community. Often, speakers of minority languages are denied basic language rights because of the absence of effective domestic provisions. It is thus arguable that Community action on these issues is justifiable *because* of, rather than despite, the application of subsidiarity. Interpreting subsidiarity as a virtually arbitrary devolution of power to the Member States might actually inhibit the feasibility of some minority claims where the Member State government is not sympathetic to the language(s) in question. Moreover, an EC language policy based on rectifying the linguistic inequality that results from the Community's official languages regime necessarily demands action at the supra-national level.

The principles of citizenship and fundamental rights already introduced apply equally to speakers of minority languages. It has been noted, however, that aspects of liberal democracy can actually operate *against* members of minority groups. The application

¹⁴⁰ McCarthy and Mercer, *supra* note 83, p. 313.

¹⁴¹ J.E. Meade, *The Building of the New Europe: National Diversity versus Continental Uniformity*, (Edinburgh: David Hume Institute, 1991), p. 18.



of human rights norms might, therefore, demand special accommodation in the minority context. Coulmas outlines potential difficulties in this respect:

The demands of linguistic minorities are largely based on the ideals embodied in the human rights to which the EC as well as the Member States in principle proudly subscribe. If the minorities have not been able to realise all of their objectives, it is because the Member States have differing traditions of understanding the human rights and laws bearing on minority concerns. Except in those areas where the Member States have through the signing of treaties transferred their sovereign rights to the EC, they do not accept any interference by the Community. For reasons of political prudence the EC must, therefore, avoid giving the impression of attempting to encroach upon the prerogatives of Member States.¹⁴²

This paragraph was written, however, before the Treaty on European Union came into effect. The provisions therein on human rights (Article F(2) TEU) and cultural affairs (Article 128 EC) alleviate many of the fears expressed by Coulmas. Furthermore, even before any formal, treaty-based confirmation, the Court of Justice had already accepted that principles of human rights could restrict EC legislative competence. This view was endorsed by a Joint Declaration of the Parliament, Council and Commission issued on 5 April 1977.¹⁴³ The implications of the evolving EC fundamental rights jurisprudence for the claims of minority language speakers are discussed in Chapter 5 *infra*. It may be noted at this stage that language rights have not yet been considered comprehensively at EC level and it is difficult to predict Community receptiveness to such claims. Significantly, however, the EC did develop an independent policy framework for minority languages, discussed in Chapter 2 *infra*.

Milian-Massana advocates that the EC should not differentiate between its official and non-official languages to the extent practised at present. He recommends that minority languages be included in EC language education programmes, that the alleviation of linguistic discrimination should be promoted, at least in terms of discrimination caused by the application of Community law, that corrective economic aid should be permitted and that all minority languages should be given a

¹⁴² Coulmas, *supra* note 1, p. 16.

¹⁴³ [1977] OJ C-103/1.

quasi-official status within the Community, similar to that already granted to the Irish language.¹⁴⁴ The feasibility of these proposals is discussed at the end of this chapter, but it is clear that comprehensive EC policy on minority languages is both desirable and possible.

From the perspective of minority groups themselves, the ambiguous nature of EC language policy to date has done little to displace the optimism with which speakers of minority languages view potential Community intervention. This can be explained by the interaction of several distinct factors. There are certain practical advantages pertaining to minority language protection at EC level, in conjunction with domestic action, that cannot be attributed to a national regime on its own. Standards of protection developed at Community level are international, thus promoting co-operation and, therefore, increased unity. EC protection would override domestic provisions in cases of conflict, providing another forum for adjudication in disputes between speakers and national authorities. Any provisions developed would supplement legal protection where national policy has been ineffective or even completely absent. Speakers of minority languages have also been encouraged to persevere in their attempts to have measures enacted at EC level by past receptiveness to their claims in the institutions (discussed in Chapter 2). It is not proposed that the EC should usurp completely the role of the Member States in the formulation of minority language policy; but appropriate guidelines implemented at EC level have a far better chance of changing ineffectual regimes than national initiatives alone. In particular, the collective, combined strength of the European minority language groups is far more influential than piecemeal, individual campaigns. In contemporary European society, language issues relate just as much to access to economic and social advancement as to grammar and syntax. Speakers of minority languages are perhaps more aware of this fact than most others; they have shown, through intense lobbying at EC level, that European society must restructure its access systems to encompass equal opportunity in the linguistic as well as any other sense. Formal equality of languages has not achieved this; neither will the

continued exclusion of fifty million European citizens who choose to speak a minority language.

G. Conclusion: Language Policy in European Civil Society

Debate on language issues is not usually identified as a contentious or even relevant facet of European Community policy. Yet the acrimonious nature of recorded opinion, the real fears of many language groups, the diversity of the concerns raised and the degree of political sensitivity pertaining to national and linguistic sovereignty defy this omission. The EC is not merely a union of policy makers, it is a union of millions of diverse, individual people. Language choice affects both the policy-maker and the individual. It is not surprising, therefore, that linguistic concerns, at both supra-national and national levels, *should* feature on the Community agenda; rather, it is incredulous that they do not appear to feature to the extent that has become critically necessary.

Mackey argues that ignorance of the contemporary languages of wider communication will carry grave consequences for modern developing polities and must be countered, irrespective of the price to be paid by their smaller languages.¹⁴⁵ It is difficult to support this contention, since he is championing the cause of an already overwhelming majority force. Breton promotes a more balanced approach, calling for 'linguistic management' within the context of respect for the equality of all languages.¹⁴⁶ In today's world, additive learning of the languages of wider communication is not just advisable, it is absolutely necessary. But subtractive language promotion, which replaces knowledge of all other languages, cannot be condoned. The European Community must give serious consideration to the questions outlined above in light of its particular influence on all the European languages, both official and non-official, and on their continuing utility. Nothing less can be expected if our evolving European society is truly a civil one.

¹⁴⁴ Milian-Massana, *supra* note 34, pp. 510-511.

¹⁴⁵ William F. Mackey, "Language diversity, language policy and the sovereign state", (1991) vol. 13:1-2 *History of European Ideas* 51-61.

7. A REFORMED LANGUAGE POLICY FOR THE EC?

A number of arguments have been advanced in favour of the accommodation of minority languages in the language policy of the European Community. What has also emerged, however, is that the present 'equality of official languages' regime does not assure *de facto* equality for even its constituent languages; it has also been shown that the rigidity of the doctrine is often circumvented in EC administrative practice. It must be asked, then, whether retaining an absolutist approach to linguistic 'equality' benefits either the Community or the languages themselves. The adoption of just one or a reduced number of official Community languages to the exclusion of all others has already been discounted; a droll answer often rendered in response to suggestions that just one or two languages should be used is that no-one, then, should be allowed to use his/her own first language, for even distribution of the inevitable linguistic handicap. But a more appropriate alternative may lie between the absolutism of both the existing and discounted arrangements.

An obvious starting point is the actually practised, though not formally acknowledged, division between working and official Community languages. Regulation 1/58 makes an explicit reference to both 'working' and 'official' languages, but this distinction has never been implemented legislatively. In reality, just one or two of the official languages are used as *de facto* working languages in the institutions. As discussed earlier, Roche has argued that the employment of pragmatism in this context would alleviate pressure on the interpretation services without trespassing on political sensitivities: he advocates the adoption of one or two working languages in the institutions, with the proviso that any individual who is unable to express him/herself in, or understand, the selected language(s) could avail of translation and interpretation services where required. This solution makes a great deal of sense, since it amounts, in effect, to the formalisation of what occurs already in practice.

¹⁴⁶ Roland Breton, "L'Approche géographique", in Truchot (ed.), *supra* note 39, 41-68 at 59.

But because of the nature of EC law, the need for an assured status for *all* languages spoken in the Member States, because of the rights resulting from citizenship generally, and European citizenship in particular, and because of persisting political tensions and uncertainties among Member States and citizens, the present system of centralised translation of EC legislation and other official documents would have to remain operative in the form of an *official*, as opposed to working, languages regime. In the context of European patents, discussed earlier, the Chartered Institute of Patent Agents explored some of the alternatives to providing a translation of every patent granted into the official languages of each of the designated Member States.¹⁴⁷ It examined but rejected the possibilities of a deferred translation filing system, translation only when demanded and translation of abstracts. The principal arguments against any one of these compromises were based on objections to the diminution of citizens rights and on the limited legal value, for national courts, of any of the proposed alternatives. The Institute concluded that “[c]ompromises abound but none is satisfactory.”¹⁴⁸

Green argues that a regime of official/working languages can work where speakers of the languages of limited function can be shown to be no worse off in linguistic terms than they would otherwise have been. But he acknowledges that *non-official* languages are, therefore, at a particular disadvantage.¹⁴⁹ This proposition echoes the debate on the stability of diglossia, discussed *supra*. It is unlikely that the Member States would be prepared to support formal expression of the working/official distinction, in light of the already precarious position of even the smaller *national* languages, unless the functions accorded to each language class were delineated clearly and were implemented as part of a far broader treatment of contemporary linguistic concerns throughout the Community. Viewed in this context, an overall reformation of EC language policy would have to include the development of a

¹⁴⁷ C.I.P.A., *supra* note 51, pp. 184-188.

¹⁴⁸ *ibid.*, p. 189.

Community strategy to accommodate non-official and other minority languages. This truth is indisputable. Whether the Community should consider its policies in terms of cultural affairs or fundamental rights, or both, is explored in Chapters 4 and 5 *infra*.

8. CONCLUSION

The issues highlighted in this chapter illustrate acute divisiveness of opinion on the optimum future development of EC language arrangements. But one truth is unanimously clear: the present language policy arrangements cannot continue without comprehensive revision. Not only are the smaller national languages being gradually excluded from the institutions in a covert but real sense, the position of non-official languages rests on an extremely fragile premise, which urgently needs to be assessed and strengthened. Considerations of monetary costs and efficiency are obviously relevant but cannot be allowed to subordinate the inherent value of linguistic diversity, primarily for language speakers but also for language evolution and, not least, for the Community itself, in terms of successful integration and economic development. The EC *must* review objectively the efficacy of its existing policy and ensure that its recent pledges to linguistic and cultural diversity go beyond an empty formulation. Should it fail to do so, the successful integration of the Member States could be sacrificed, since true unity will only be achieved through respect and provision for diversity. A framework for developing a reformed EC language policy has been outlined, which could, and should, encapsulate minority languages also. But even if the present language policy persists indefinitely, the Community must acknowledge its policy shortcomings, in respect of languages left outside the official regime, and begin to redress the resulting deficits. In Chapter 2 *infra*, the evolving awareness within Community institutions that minority languages matter, prior to the changes in EC structure brought about by the Treaty on European Union, is outlined, showing that the foundation for reformulation of the present language regime is already established.

¹⁴⁹ Green, *supra* note 4, p. 665.

CHAPTER 2

DEVELOPMENT OF EC MINORITY LANGUAGE POLICY: PRE-MAASTRICHT/AMSTERDAM

1. INTRODUCTION

In Chapter 1, a number of arguments - economic, sociological and political - were presented in favour of reforming EC language policy, including the adoption of measures oriented specifically towards minority languages. It was pointed out, however, that policy development must be grounded in appropriate legal bases. Both the Maastricht and Amsterdam Treaties have enhanced Community competences, particularly in the fields of culture, and fundamental rights and citizenship, discussed in Chapters 4 and 5 respectively. Whether this diffusion of competence has had any practical effect is considered in Chapter 6. But, as with many Community policies, the first manifestations of EC involvement in minority language issues can be traced back to more than a decade *before* the ratification of the Treaty on European Union. This Chapter focuses on developments in both the European Parliament and the Court of Justice that related specifically to minority language initiatives.¹ The attitudes and reactions of the Court and, more particularly, the Parliament were responsible for the piecemeal evolution of a Community perspective on minority languages. This chapter focuses on the identification of first, emerging trends in institutional reaction, whether hostile or supportive, towards minority language claims and, second, the various sources of legal competence derived by the institutions, in light of the absence, at that time, of directly relevant Treaty provisions.

2. INITIATIVES IN THE EUROPEAN PARLIAMENT

¹ Measures that affect minority language policy in an incidental or secondary manner are outlined in Chapter 4 *infra*, which deals with cultural policy in a broader sense.

The European Parliament is often regarded as the champion of minority language concerns within the EC. This reflects its function as a representative body, in that it brings to the fore the concerns of citizens throughout the Community far more effectively than any of the other institutions. This section outlines the initiatives introduced by the Parliament in the 1980s, analysed particularly from the perspectives of motivation and legal basis. The texts of the Resolutions discussed are contained in Appendix II.

A. Arfé Resolution (1981)

Resolution on a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities.²

(i) Background

The genesis of the Arfé Resolution can be traced to calls within the Parliament in the late 1970s for a report on the feasibility of a Community charter on minority cultures, such as that tabled by John Hume MEP on 26 October 1979.³ This corresponds with the increasing momentum in favour of European union that permeated the Community at that time, which had culminated in the preparation of the Tindemans Report. In this pro-integration political climate, reconciliation of the seemingly conflicting values of unity and diversity became a corollary, albeit lesser, item on the Community agenda. Mr. Hume's motion was directed primarily towards the Parliamentary Committee on Youth, Culture, Education, Information and Sport, and the Committee on Regional Policy and Regional Planning. On 19 December 1979, the former Committee appointed M. Arfé as rapporteur, instructing him, on 15 February 1980, to draw up a report on the feasibility of a Community charter on regional languages and cultures, and on the rights of ethnic minorities. The resulting Resolution was adopted on 16 March 1981.

² European Parliament, 16 October 1981, [1984] OJ C-287/106.

³ Doc. 1-436/79.

The Preamble to the Resolution provides further insight into the motivations behind its adoption. The Parliament was clearly aware that minority rights had become an issue of increasing importance as well as controversy. The reference to 'the most recent political, legal and anthropological theories' probably relates to the growing corpus of writings on sociolinguistics, as well as to the preparatory report for the Committee on Youth, Culture, Education, Information and Sport, drawn up by M. Arfé. The Preamble reflects the view that the diversity of cultural identities throughout the Member States is an essential element of the cultural heritage of Europe. By focusing on diversity, the Parliament was rejecting the notion of enforced linguistic conformity, which is sometimes considered a linchpin of 'true' political unity. The Preamble also recognises the fundamental rights dimension of language choice, referring to 'declarations of principle' already made by the United Nations and Council of Europe in this context. More specifically, the Parliament acknowledged that all Member State governments had recognised the right of ethnic and linguistic minority groups to freedom of expression 'in principle' and noted that 'most' had initiated legislative programmes to ensure the implementation of that principle. The pragmatic link between the preservation of linguistic diversity and prevailing economic conditions, particularly in the case of regional languages, was stated expressly. What is most notable by its absence, however, is any attempt to derive a Treaty-based competence for Community action in this policy area. Language rights were placed within a vague context of culture and heritage and viewed as an inherently 'human' issue: this latter aspect is demonstrated by the reference to cultural identity as one of the most important contemporary 'non-material, psychological needs'. To assess the implications of the absence of legal basis, it is first necessary to consider the nature of the measures proposed in the Resolution.

(ii) Content and commentary

The Arfé Resolution sought primarily to encourage national, regional and local authorities to promote the use of minority languages in the fields of education, media and public life. The Commission was called upon to provide funding for appropriate

projects, to collect information on the minority languages of Europe and 'to review all Community legislation or practices which discriminate against minority languages' (Article 6). The latter clause has considerable potential; it demonstrates that language use is affected by a broad spectrum of policy initiatives and that, in the particular context of EC policy-making, Community law affects a number of peripheral domains. The Parliament acknowledged the 'wide differences' in the situations of minority language groups across the Community but called for the implementation of certain common objectives in the traditional language-planning domains of education, communications and public life. Given that the Resolution was the first significant institutional proclamation on the value of minority languages, the provisions are understandably cautious but they also contain some progressive innovations. The Parliament stressed, for example, the role of regional and local as well as national and international government in the field of language policy, while also highlighting the potential for co-operation between these various levels of authority. The request that the EEC Regional Fund should contribute to 'the financing of regional economic projects' draws this philosophy to a practical conclusion. Another innovation is that the Resolution focuses not only on minority language education in the primary school sector, but looks at its provision right up to, and including, university level. Also in the domain of education, the Parliament called for the incorporation of minority languages into existing multilingual education programmes. The Parliament envisaged a coordinating role for the Commission in respect of the collection of data and the funding of research and pilot studies. By encouraging communication between linguistic groups and the Community institutions, the cross-border dimension of language issues was emphasised, thus implicitly substantiating the need for Community intervention in this field.

The phraseology employed suggests a more proactive role for the Member States, however, asking that they 'provide for', 'promote' and 'take steps to ensure', in addition to 'allowing', the realisation of the initiatives proposed. This illustrates recognition by the Parliament that positive government action is necessary to ensure

effective implementation of language rights. It is also clear that, from the outset, different roles were envisaged for the Community and the Member States in the promotion of linguistic diversity. The primary responsibility for policy implementation was placed clearly on the Member States themselves, with the Community acting more as coordinator. The Resolution (which is not, of course, legally binding in any event) can thus be interpreted as a purely declaratory instrument. This interpretation does not render the absence of legal competence quite as damning as might otherwise be anticipated. It is clear, however, that the Parliament identified both a standard for language rights, measures below which were not acceptable, as well as a number of specific language-use domains requiring attention at both national and Community levels. Considerable support for the effective recognition of minority language rights can be gleaned from the Resolution; it is equally clear that the Parliament envisaged a role for the Community in this context. Given the nature of Resolutions in general terms, as well as the absence of Treaty-based competence at that time, the Arfé Resolution can not be interpreted as an attempt to place legally binding duties on the institutions or the Member States. But a clear policy stance was adopted, confirming, at least, the desirability of such measures. The Parliament thus created a definite role for the Community in this field out of very little indeed.

(iii) Impact of the Resolution

The Resolution did generate some activity in favour of minority language promotion at Community level. In the immediate aftermath, the European Bureau for Lesser Used Languages (EBLUL) was founded (October 1981), to preserve and promote minority and regional languages in the Member States of the Community.⁴ It is funded by subventions from the Community and from the governments of certain

⁴ The phrase 'lesser used language' was adopted in an attempt to avoid the negative connotations of the word 'minority'; some commentators have, however, been critical of this wordplay: "I use my language just as much as any speaker of a majority language [so] the problem of comparison is still there: lesser used than what?...I think that we must accept the term 'minority language' in spite of its connotations, the way forward is to give it higher status and better connotations." (Michael Reuter, "Summing up", in Gearóid Mac Eoin, Anders Ahlqvist and Donncha Ó hAodha (eds.) *Third International Conference on Minority Languages: General Papers*, (Clevedon, Avon: Multilingual Matters, 1987), 213-218 at 216.

Member States. It publishes the inter-group *Contact Bulletin*, coordinates research projects, and collects and organises relevant data. In 1986, the Committee on Youth, Culture, Education, Information and Sport commissioned the Istituto della Enciclopedia Italiana to produce a report on *Linguistic Minorities in Countries belonging to the European Community*, based on questionnaires that had been dispatched to the Member States.⁵ Having analysed the responses received, the Commission recommended constitutional recognition of minority languages in the Member States, implementation of that status in a real sense, the formation of a Minorities Commission and the provision of appropriate economic aid for research and study programmes. Significantly, the Report considered that "...the treatment of linguistic minorities is by its very nature a political problem, and secondarily a problem of language policy."⁶ Action undertaken as a direct result of the Arfé Resolution focused essentially, therefore, on gathering information about the various minority language groups across the Community. Some of the corresponding recommendations made, such as the constitutional recognition of linguistic minorities, were quite far-reaching from the perspective of their potential impact on national governance. Given that the Resolution marks the very early stages of the Community's foray into minority language protection, its subsequent impact on the EC institutions is at once both superficial and extensive; superficial as regards the actual measures and projects undertaken, which stopped short of investigating legal competence in this domain and were framed in a suggestive rather than imperative format; but extensive in that neither the Commission nor the Parliament hesitated when placing responsibility for minority language groups on the Member State governments, notwithstanding the lack of a substantive Treaty provision upon which they could ground this 'interference' into domestic political practice.

It is more difficult to assess the impact of the Arfé Resolution from the perspective of minority language speakers. It is true that it is widely referred to in contemporary

⁵ Istituto della Enciclopedia Italiana/European Commission, *Linguistic Minorities in Countries belonging to the EC*, (Luxembourg: Office for Official Publications of the European Communities, 1986).

language rights campaigns but it is probable that awareness of the Resolution has only come about after the fact, in light of the subsequent formation of the EBLUL which would have undertaken a publicising function. Furthermore, promotion of the European Parliament measures has been relatively recent, so that Arfé is usually considered collectively, along with subsequent measures, rather than individually. That public awareness of the Resolution developed over time rather than at the outset is substantiated by Temple: she refers to a survey undertaken among Breton speakers which posed questions on the impact of Arfé specifically, but it was found that most respondents had not known that the Resolution even existed.⁷

B. Arfé Resolution (2) (1983)

Resolution in favour of Minority Languages and Cultures⁸

The tone of the Preamble to the second Arfé Resolution, adopted on 11 February 1983, indicated some impatience within the Parliament, since its initiatives had not been followed through to any great extent by the other Community institutions. The original recommendations were, therefore, restated in this Resolution, more intensely in some instances. For example, the proposed review of Community legislation, called for in Article 6 of Arfé (1), was replaced by the statement that ‘all Community *and national* legislation *and practices*’ that discriminate against minority languages should be reviewed by the Community (emphasis added). Moreover, the Parliament called upon the Commission to ‘prepare appropriate Community instruments for ending such discrimination’. This is a particularly striking provision, since it implies that the Community should not only tackle discriminatory EC measures, but also those enacted by the Member States. Even more surprising in this context is that, once again, the Parliament did not establish or even address whether the Community had legal competence to introduce such measures. The Resolution confirmed the role

⁶ *ibid.*, p. 232.

⁷ Rosalind M. Temple, “Great expectations? Hopes and fears about the implications of political developments in Western Europe for the future of France’s regional languages” in M.M. Parry, W.V. Davies and R.A.M. Temple, *The Changing Voice of Europe*, (Cardiff: University of Wales Press, 1994), 191-211 at 202-4.

of both local and regional government in minority language protection, but also anticipated a continuing and more intense function for all of the Community institutions. Arfé (2) required the Commission to report to the Parliament by the end of 1983, on progress made with the implementation of the Resolution, but this did not materialise in practice.

C. Kuijpers Resolution (1987)

***Resolution on the Languages and Cultures of Regional and Ethnic Minorities in the European Community.*⁹**

(i) Introduction

This Resolution was adopted on 30 October 1987, more than four years after the adoption of Arfé (2). The lengthy preamble indicates that Community interest in minority language issues had strengthened rather than declined in the interim period. But still, no Treaty provision was identified as a legal basis for *any* of the measures proposed in the Resolution. The extensive list of national and international instruments cited in the preamble can, therefore, be interpreted as an alternative attempt to buttress the legitimacy of Community action in the field.

(ii) Content and commentary

The Kuijpers Resolution reiterates and elaborates on the principles outlined in the Arfé Reports. Language rights are placed firmly within the ambit of international human rights, with stronger references to the work of both the United Nations and the Council of Europe. Relevant international instruments had been referred to as 'declarations of principle' in the previous Resolutions but are cited in Kuijpers as 'basic principles regarding the rights of minorities formulated and approved'. In particular, the Council of Europe's Charter on Regional and Minority languages, in preparation at that time, was supported expressly. It was also acknowledged that the

⁸ 11 February 1983, [1983] OJ C-68/103; cf. Appendix II for text.

⁹ 30 October 1987, Doc. A 2-150/87; cf. Appendix II for text.

implementation of minority language rights constitutes an element of the prevention of discrimination.

The Parliament alluded to strengthening the autonomy of the regions and yet creating a 'more politically unified European Community', reflecting the viewpoint that unity can only be attained through the encouragement rather than suppression of diversity. It advocated the need to support the improvement of economic conditions at regional level, as a corollary of the development of localised cultures and languages. The Parliament expressed 'regret' that the Commission had failed to 'deal comprehensively' with the rights of minorities since the adoption of Arfé (1). But this admonition overlooks the Parliament's own failure to derive a legal competence upon which comprehensive action could actually be based. Notwithstanding this oversight, the Kuijpers Resolution calls expressly for the full implementation of both Arfé Resolutions and proceeds to restate and expand the principles endorsed originally therein.

At the outset, the Resolution recognises the need for and value of legal recognition for minority languages at Member State level, describing it as 'the basic condition for the preservation of regional and minority cultures and languages' (Article 2). The phraseology used in this context is relatively cautious. The Parliament 'points out' the need for constitutional recognition but does not demand or require it. In Article 3, however, the Parliament 'calls on the Member States whose Constitutions already contain general principles on the rights of minorities to make timely provision on the basis of organic laws, for the implementation of those principles'. As shown in Appendix I, the majority of Member States have made some provision for minority languages; but formal recognition in its own, without any commitment to effective implementation, is a hollow political exercise. The Parliament identified correctly that enactment of a coordinated, usually legislative, enforcement programme is a necessary corollary to constitutional recognition. It is arguable that this apparently strong demand is weakened by the fact that it is directed only towards those Member States who have *already* taken some steps towards the protection of linguistic

minorities and have, therefore, displayed a sympathetic predisposition to these concerns. But it must be remembered that the Community has called upon Member States to act on *national*, constitutional provisions: this casts the Resolution in a more radical light, accentuated by the fact that recognition and implementation of minority rights in any governmental forum is a highly contentious political issue.

While focusing on the traditional domains of language use - education, law and administration, media, cultural events, and social and economic measures - the Kuijpers Resolution goes further than its predecessors. It contains both general, sweeping principles and more specific calls for action. The provision of adequate staff and other resources was deemed essential for the promotion of education through the medium of a minority language (Article 5). The use of minority languages for administrative and legal purposes (Article 6) was associated with local authorities 'in the first instance'. This does not, however, preclude the adoption of broader provisions by national authorities where speakers of a minority language are not contained geographically in a specific region or where local authorities do not have the requisite legislative autonomy to design linguistic policies in the first place. Under the administrative/legal heading, the Parliament called for a review of 'national provisions and practices' that discriminate against minority languages. This specification that 'practices' as well as 'provisions' be checked echoes the emphasis placed on the implementation, and not just formulation, of linguistic policy.

The Resolution advocates that the languages through which decentralised government services are provided should be determined by the linguistic structure of the geographical area covered. It is arguable, however, that minority languages must also be incorporated into services provided by centralised government authorities, so that a basic level of service, at least, can be provided through the minority language where requested. This practice ensures equal treatment of all citizens and respect for language rights.¹⁰ It can also be adapted to supra-national authorities; it is argued in

Chapter 5 *infra*, for example, that the EC should incorporate minority languages into its policy of dealing with Community citizens in the official language of their choice.

Article 7 deals with the mass media. It contains general principles on recognition of and respect for minority languages in broadcasting and on access to the media for minority language groups. More specific opportunities for direct action in this domain are also outlined, such as supporting the training of journalists and technical staff who work through the medium of a minority language, as well as ensuring that the latest broadcasting technology is available to them. The cultural infrastructure is addressed in Article 8. The Parliament recommended the foundation of institutes to undertake studies, to co-ordinate and gather information, and to provide and supervise education through the medium of minority languages. The inclusion of the banking and consumer sectors (Article 9) has potentially far-reaching consequences, in that it relates to sectors *outside* the ambit of government services. This is significant because of the trend towards the privatisation of utilities formerly controlled by governments (*e.g.* telecommunications, power supply), which has removed more and more services from the protective realm of 'official' use of language.

The remaining paragraphs deal largely with the role of the Community institutions. The long-expressed ideal that the Commission should place minority languages in a broader context, by considering the impact of *all* legislative initiatives on culture and language, is reaffirmed. The Parliament recommends strongly that the institutions and the Member States support the work of EBLUL, particularly in terms of financial assistance. It is significant that, in Article 12, the Parliament calls on the Commission to take every action to implement the Resolution 'within its terms of reference', yet the Parliament itself did not attempt to grapple with identifying what those constraints might be. Interestingly, the Parliament places minority languages within the ambit of 'cultural and educational policy' but it is debatable whether this

¹⁰ In Ireland, for example, in preparation for the drafting of imminent language legislation, all central and local government departments were required to draw up a customised language plan, based on demand for services through Irish experienced by each individual department.

Community competence existed at the time. Article 128 EC, dealing with cultural policy, only came into effect after the ratification of the Treaty on European Union; the original Article 128 EEC, dealing with vocational training, had been extended by the Court to apply to education in a broader sense, but this development was still fairly controversial in 1987.¹¹

In Article 15, the Parliament '[s]tresses categorically that the recommendations contained in this Resolution are not to be interpreted or implemented in such a way as to jeopardise the territorial integrity or public order of the Member States'. This is undoubtedly a reference to the extremities discussed in Chapter 1 *supra*, such as the secession of minority groups from their governing states. It is reaffirmed, however, that this aspect of minority rights is neither a universal nor inevitable phenomenon. Secession represents the least common but most publicised consequence of minority rights recognition. It was shown that extreme reactions are far more likely to result from the repression rather than recognition and implementation of minority rights.

Finally, it should be noted that the Parliament recognised that migrant workers and overseas minorities have specific but different needs as minority groups, which should be addressed separately by the European Community.

D. General Comments on the Resolutions of the European Parliament

The Parliament has clearly displayed an ongoing commitment to minority language issues, despite the fact that it could not draw upon any recognised Community competence to bolster its calls for action. The range of issues covered in the texts, particularly in the Kuijpers Resolution, demonstrates an awareness of most of the central concerns of minority language speakers, as well as a commendable comprehension of both the potential and limits of language planning policies. It is clear from the tone of the later texts, however, that the Parliament had not been able to influence the other Community institutions as much as it had intended. A number of reasons traditionally associated with resistance to the granting of minority rights

may be relevant here. Minority rights, in any context, are one of the most contentious aspects of the contemporary fundamental rights debate. The Commission may, therefore, have evaded the adoption of a definite policy stance to avoid trespassing on the undoubtedly diverse political sensitivities of the Member States. National policies on minority language rights vary greatly throughout the Community, as demonstrated in Appendix I. The fact that the Parliament was not acting in accordance with any discernible Community competence provides another fundamental explanation as to why Parliamentary initiative was not, and indeed could not, be translated into concrete programmes of action, above and beyond the coordination of funding and data collection that did result. Given the unease expressed over the broad interpretation of Article 128 EEC (vocational training) around the same time, the Commission was unlikely to land itself knowingly in the midst of yet another Community versus Member State competence contest. It must be remembered that in the 1980s, the European political climate was characterised by strong movements both in favour of *and* against intensified European unity. The ratification of the Single European Act was not achieved without resistance, but the build-up to the Maastricht negotiations in particular revealed even further the deep-rooted insecurities and objections of an increasing number of European citizens. In one sense, it is surprising that the Resolutions on minority languages did not really generate much controversy within the Parliament itself, on grounds of national sovereignty for example; but, on the other hand, resolutions have no legal effect. The latter interpretation reflects the cynical truth that policy makers are far more willing to declare principles than policy actors are to implement them in turn. Thus, supporting a relatively innocuous resolution would not cause too many political ripples and may gain favourable publicity, and, in turn, sympathy from those affected, yet would not require any substantive action to be undertaken. This analysis does not detract from the work of the Parliament; rather, it sheds light on why the recommendations made were not subsequently acted upon. Albanese asserts that the resolutions "...are based on the idea that European union should be more than a common market, and that unity is possible only if the present cultural pluralism is

¹¹ The position was later clarified in Case 24/86 *Blaizot v. University of Liege* [1988] ECR 355.

respected. These texts represent a political choice for the future....”¹² He acknowledges, however, that it would not have been possible to adopt legally binding texts on the protection of minorities. That argument has been stressed throughout this chapter and is reflected even more acutely in the following consideration of the jurisprudence of the Court of Justice during the same time period.

3. JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

It was observed in Chapter 1 that language choices are affected by a myriad of direct and indirect factors which, on the surface, seem otherwise unrelated. It was also noted that, in the Pre-Maastricht Community era, the Treaty did not authorise the EC to determine language policy beyond structuring its own official languages regime. This did not, however, thwart the European Parliament in its policy formulation activities throughout the 1980s. But the European Court of Justice is bound by the parameters of the Treaties in quite a different way, or is it? The interpretative developments in respect of vocational training, referred to *supra*, illustrate that the Court of Justice is not immune to the employment of judicial activism. Against this background, the cases in which the Court was obliged expressly to consider the Community position on minority languages are analysed *infra*.

A. Ministère Public v. Robert Heinrich Maria Mutsch¹³

(i) Facts

The applicant, a Luxembourg national, resided in a German-speaking municipality in Belgium. In 1981, he was charged with a criminal offence, related to a late-night dispute with members of the Belgian police force. He was questioned by the police through the medium of German; all forms and records relating to the charge were also completed in German. The trial summons was issued in French, but it was accompanied by a German translation. Initially, the applicant was convicted and

¹² Ferdinando Albanese, “Ethnic and linguistic minorities in Europe”, (1991) 11 *Yearbook of European Law*, 313-338 at 323.

¹³ Case 137/84, [1985] ECR 2681.

fined *in absentia*, but he appealed to have that judgment set aside. He also requested that the proceedings take place in German. Both requests were granted by the Belgian court.

The Public Prosecutor's office appealed against the latter part of the decision, however, maintaining that since the accused was a Luxembourg national, he did not have the right to be tried through German. Article 17(3) of the Belgian Law provides that an accused person of Belgian nationality residing in a German-speaking municipality is entitled to request that court proceedings be conducted through German. Although the accused in this case asserted that he spoke only German, or at least expressed himself more easily in that language, the Prosecutor argued that only Belgian nationals could avail of the rights granted by Article 17(3). The Belgian Court of Appeal was unsure whether this restriction was compatible with EC law and thus referred the following question for a preliminary ruling under Article 177 EEC:

Does the third paragraph of Article 17 of the [Belgian Law] on the use of language in the courts...comply with the principles referred to in Article 220 of the Treaty, which is intended to secure the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each Member State to its own nationals, that is to say, in the case in point, is it or is it not necessary, in a criminal case, to grant a German-speaking EEC national, and in particular a Luxembourg national residing in...a German-speaking municipality, the right to require that the proceedings take place in German?¹⁴

Article 220 EEC set out that "[m]ember states shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to own nationals...." In this context, the Commission observed that "...a Member State is not obliged to grant the nationals of other Member States the rights referred to in Article 220 so long as the Member States have not entered into an agreement as referred to in that article."¹⁵ The Commission did suggest, however, that other provisions of the EEC Treaty, in respect of free movement of workers and the right of establishment, might be

¹⁴ *ibid.*, p. 2683.

relevant. In particular, the Commission concluded that the legal status of the applicant as a migrant worker from another Member State ensured his right to be tried in German, in accordance with the rights granted to Belgian nationals in similar circumstances.

Significantly, the submission made by the Italian Government placed the case in the context of minority language rights, but argued for a restrictive interpretation, as follows:

[N]ational legislation for the benefit of language minorities applies only to members of the minority in question and to the area where the language is spoken. A member of a recognised language minority can not therefore require the use of his language in legal proceedings outside the area where his language is spoken. Nor can a national of another Member State require that the minority language be used on the grounds that he speaks the minority language (which is not the national language of the State in which he lives) and lives in the area where the minority language is spoken. In such proceedings, interpreters must be used.¹⁵

It was noted that the employment of interpreters in these circumstances fulfilled the requirements for criminal proceedings set out in the European Convention on Human Rights.

(ii) Judgment of the Court

The Court of Justice adopted the approach put forward by the Commission in respect of Article 220 EEC *i.e.* given that an agreement on the mutual recognition of language rights did not exist between Belgium and Luxembourg, it was not possible for the applicant to employ that provision in the present case. However, the Court also applied the broader reasoning suggested by the Commission, based on the rights of migrant workers. It classified the right to use a particular language in the courts of another Member State, under the same conditions as nationals of that State, as a 'social advantage', within the meaning of Article 7(2) of Regulation 1612/68. Specifically, the Court referred to its decision in *Ministère Public v. Even*, where it defined 'social advantages' as "...all advantages 'which, whether or not linked to a

¹⁵ *ibid.*, p. 2684.

¹⁶ *ibid.*; cf. Case C-274/96, *Bickel and Franz* (24 November 1998), Chapter 6 *infra*.

contract of employment, are generally granted to national workers primarily because of their objective status or by virtue of the mere fact of their residence on the national territory’.”¹⁷ Applying this interpretation to the present case, the Court stated that “[t]he right to use his own language in proceedings before the courts of the Member State in which he resides, under the same conditions as national workers, plays an important role in the integration of a migrant worker and his family into the host country, and thus in achieving the objective of free movement of workers.”¹⁸ Furthermore, the Court cited Article 7 EEC, which prevented discrimination on grounds of nationality.

In a terse but significant statement, the Court declared that “[i]n the context of a Community based on the principles of free movement of persons and freedom of establishment the protection of the linguistic rights and privileges of individuals is of particular importance.”¹⁹

(iii) Commentary

While the Court did not address directly whether a policy on minority language rights existed in Community law, an implicitly supportive attitude can be gleaned from its decision. Advocate General Lenz tackled this aspect more overtly in his Opinion on the case, discussed *infra*. It is significant, for example, that the only barrier to the application of Article 220 EEC (‘enjoyment and protection of rights’) was the absence of an appropriate inter-state agreement on language rights. It can be concluded, from the fact that Article 220 EEC was even considered, that the Court *did* view the use of a particular language in criminal proceedings as a *right* and not just a privilege.

Advocate General Lenz discussed the nature of ‘social advantages’, to which Community workers are entitled without discrimination, in some depth. He argued

¹⁷ *ibid.*, referring to Case 207/78, [1979] ECR 2019.

¹⁸ *ibid.*, p. 2696.

that there existed two specific categories of rights and duties: first, those involving a 'special relationship of allegiance' to the state in question and, second, social rights that must be guaranteed to all workers without discrimination. In the context of the present case, he stated that "[c]riminal proceedings certainly do not involve a 'special relationship of allegiance', so safeguarding the rights of the defence, which includes choice of language of the proceedings, cannot be made dependent on nationality."²⁰ He did not elaborate further on the nature of a 'special relationship of allegiance', however, so it is not certain that all language issues are exempt from this criterion. One language more than any other is often deeply connected with a particular state or regional identity: taken to extremes, a state could conceivably argue that because of this close association, there cannot be a role for any other languages due to threats of non-uniformity, which would impinge on the notion of 'special allegiance'. Traces of this philosophy can be identified in the French government's language policies, outlined in Appendix I, which have had a detrimental effect on the recognition of language rights for French citizens who speak a language other than the national language *e.g.* Breton. The Court has never been called upon to consider this hypothetical argument but it would certainly present a tough political decision for the Court, bringing national sovereignty and the multicultural ethos of the Community into direct conflict.

In a statement that reflects developments in the European Parliament at that time, the Advocate General stressed that linguistic discrimination based on nationality "...is certainly not in keeping with the establishment of a 'Citizen's Europe'. Nor does it contribute to the integration of the worker in the host country, in particular in the linguistic region in which he lives."²¹ In the context of non-discrimination and equal treatment, Advocate General Lenz, referring to established case-law, pointed out that the Court has always adopted a broad approach to the interpretation of these concepts

¹⁹ *ibid.*, p. 2695.

²⁰ *ibid.*, Opinion of Advocate General Lenz, pp. 2685-6.

²¹ *ibid.*, p. 2689; it was noted in Chapter 1 *supra* that motivation for Community protection of the language rights of migrant workers could be attributed to a desire to ensure the successful integration of workers and their families, rather than to the promotion of linguistic diversity *per se*.

and noted that while equal treatment is based on an individual's status as a Community worker, the principle can also be applied to situations *outside* the employment relationship.²² Applying this precedent to the present case, he concluded that:

...it cannot be assumed that [social] advantages...are inapplicable merely because they are granted in order to protect minority rights...The requirement of equal treatment...applies in areas which are not primarily governed by Community law but on which Community law may have indirect effects...[The possible application of Article 7(2) EEC] cannot be dismissed with the simple statement that matters concerning the organisation of the courts or the use of languages in criminal proceedings are not governed by Community law.²³

The last sentence in this passage reflects the idea of 'spillover' in respect of Community competence. The Advocate General has recognised that because the effects of EC law cannot be contained precisely, its impact is often wider than the achievement of the specific goals or objectives outlined in the Treaties or in secondary legislation. He thus laid the jurisdictional foundation for the Court to examine national language policy in respect of its compliance with Community law, confirmed in the *Groener* case, discussed *infra*.

The Advocate General *did* refer interchangeably to language/minority rights. It may be recalled that the Italian Government submitted a number of arguments based on minority rights criteria but, although referred to in the opening stages, these arguments were not addressed by the Court. Somewhat paradoxically, the Advocate General asserted that minority rights criteria could not apply in this case, since the languages referred to in the Belgian legislation - Dutch, French and German - are not classified as minority languages therein: "[e]xpressions such as national language, native language, linguistic minority and so on are not to be found in it. I therefore do not consider it correct...to rely on general principles of law regarding the protection of linguistic minorities, as was done by [the Italian Government]."²⁴ This is an

²² *ibid.*, pp. 2688-9; cf. Case 15/69 *Südmilch v. Ugliola* [1969] ECR 363; Case 9/74 *Casagrande v. Landeshauptstadt München* [1974] ECR 773; Case 32/75 *Cristini v. SNCF* [1975] ECR 1085 and Case 65/81 *Reina v. Landeskreditbank Baden-Württemberg* [1982] ECR 33.

²³ *ibid.*, p. 2689.

extremely disappointing interpretation, relying as it does on domestic classification of languages as a precondition to the application of international standards. This literal approach has, in fact, been rejected by even the more conservative minority rights theorists.²⁵ Under the Advocate General's interpretation, the protection of language rights by an international entity is wholly dependent on the classification of languages adopted by that state, which defeats the very purpose of international intervention in the first place. This automatic deference to the Member State might appear to doom any attempt to discern an effective EC minority language policy from the outset. But the remainder of the Advocate General's comments on language rights simply do not fit with this pessimistic interpretation. Although within the framework of national rules on the use of languages, the Advocate General recognised the principle of language *choice*, where he stated that "[i]t would be inconsistent and incompatible with the principle that workers from other Member States must be treated in the same manner as national workers if [the applicant] were suddenly to find that in criminal proceedings he could no longer use the language *which he can use in everyday life* and in which workers who are Belgian nationals may, *if they wish*, be tried."²⁶ This interpretation presupposes the existence of a domestic language choice regime, but it nonetheless determines that language rights come into play well before the criteria outlined in the European Convention on Human Rights. These criteria are discussed in detail in Chapter 5 *infra* but it may be noted at this stage that an accused must be unable to *understand* the language of court proceedings before interpreters will be appointed. This is a much weaker standard, from the perspective of language rights, than that of *choosing* a language 'used in everyday life'. The Advocate General expressly rejected, therefore, the

²⁴ *ibid.*, p. 2690.

²⁵ *cf.* Chapter 5 *infra*, on international fundamental rights standards; the United Nations Report on Ethnic, Religious and Linguistic Minorities, for example, concludes the exact opposite to Advocate General Lenz, stressing that the absence of domestic recognition of minority languages does *not* prevent the application of international protection mechanisms; this interpretation is absolutely necessary given that it is often due to the very fact of domestic non-recognition that international redress is actually sought.

²⁶ *supra* note 13, p. 2689 (emphasis added).

argument put forward by the Italian Government that the use of interpreters would suffice in the present case. In a remarkable passage, he clarified the relationship between the EC and the Council of Europe:

In the area of fundamental rights, the Court has certainly drawn from the Convention, in the sense that it has treated the Convention as supplying common minimum standards. It is not contrary to the European Convention on Human Rights for Community law to grant more extensive protection to individual rights. Indeed, the Court has held that Community law takes precedence over other agreements concluded within the Framework of the Council of Europe in so far as it is more favourable for individuals.²⁷

This interpretation has immense implications for Community fundamental rights policy and for language rights in particular, as the Council of Europe has not yet established an effective, legally enforceable framework for the rights of minority language speakers, discussed in Chapter 5 *infra*. The Advocate General's remarks must be appraised in terms of potential rather than effect, however, since, as he was careful to point out in the closing paragraphs of his Opinion, "...there is no question of requiring the Member State to permit the use of other languages in addition to those already available [under its language policy regime]. In this case the question is whether a worker from another Member State can rely on a legal provision regarding language use which exists in the Member State concerned and is available to its own nationals."²⁸

What conclusions, then, can be drawn from the Advocate General's opinion and from the judgment of the Court? In first instance, both the Advocate General and the Court were decidedly more reluctant to issue any pronouncements on minority language rights than the European Parliament was at that time. This demonstrates the fundamental differences between the two institutions, in terms of both function and impact. The decision of the Court would become a binding precedent, applicable to numerous potential situations throughout the Member States; this contrasts sharply

²⁷ *ibid.*, p. 2690; cf. Case 187/73 *Callemeyn v. Belgium* [1974] ECR 553; Opinion of Advocate General Lenz in Case 157/84 *Frascogna v. Caisse des Dépôts et Consignations* [1985] ECR 1740. In the present case, Advocate General Lenz pointed out that, prior to the intervention by the Public Prosecutor, the Belgian Court had been quite happy to proceed with the case through German; the introduction of an interpreter would have added needless cost and inconvenience.

with a non-binding European Parliament resolution. The determination of a legal basis for Community competence is, therefore, far more problematic for the Court than for the Parliament. In this case, the Court chose to avoid the minority language issue altogether, which it could easily do, given the questions of European law actually referred, and the fact that Belgium already had an official languages regime in place. All that the Court needed to decide was whether non-Belgian nationals could benefit from the pre-existing regime; it did not have to examine the substance of the Belgian policies. The inconsistencies within the Advocate General's opinion suggest, however, that because minority language rights had been introduced into the Court's jurisprudence without a substantive legal basis, he was unable to deliver a coherent assessment of any corresponding EC approach. His willingness to use minority rights terminology and his far-reaching statements on the limitations of the European Convention are in complete contrast with his conclusive reliance on the domestic classification of languages, which has been virtually disregarded in international law more generally. Furthermore, there are no references in the Opinion to the work of the Parliament, which had already adopted both Arfé Resolutions at this time. It is likely that the Advocate General was prepared to address the case from a language rights perspective but was constrained by the ambit of EC law at that time; he may also have been conscious of offending Member State sensibilities, by pronouncing on what were seen as internal issues.

The overall impression, then, is one of vague sympathy within the Court for claims based on minority language rights, which was not, for the reasons outlined above, translated into justiciable effect. In any event, the Court was able to reach the conclusion that vindicated the language rights of the applicant without having to explore language rights *per se*. But the Opinion of the Advocate General must be noted for his broad interpretation of language rights, not based on language competence but on language choice, and for significant comments on the jurisdiction of the Court of Justice to grant more extensive protection for fundamental rights than

²⁸ *ibid.*, p. 2690.

that provided for in the European Convention, on the basis that an individual should benefit from the most extensive protection available.

B. Anita Groener v. Minister for Education and the City of Dublin Vocational Education Committee ²⁹

McMahon observes that the decision in *Groener* reflects the tension between a number of competing interests, cultural and economic, national and supra-national, individual and Community.³⁰ The Court of Justice had the potential to formulate its first substantive interpretation of the Community's role, if any, in the language policies of the Member States. The Court did not, however, avail of this opportunity; rather, it delivered a brief and, on an initial interpretation at least, disappointing judgment of limited application.

(i) Facts

The applicant was a Dutch national, residing in Ireland since 1982. She was employed as a part-time art teacher at the Dublin College of Marketing and Design, which was under the authority of the Dublin Vocational Education Committee (the second respondents), a state-subsidised body charged with the administration of vocational education in the Dublin area. In 1984, the applicant applied for a permanent, full-time lecturing post at the College. Her application was successful but, in accordance with procedures established by the Minister for Justice,³¹ her appointment was conditional on her passing an oral Irish language examination. The

²⁹ Case C-379/87, [1989] ECR 3967.

³⁰ Bryan McMahon, (casenote) (1990) 27 *Common Market Law Review*, 129-139 at 130.

³¹ Two administrative measures had been adopted in accordance with the powers granted to the Minister by the Vocational Education Act, 1930:

[1] Memorandum V7 (1 September 1974) required that a person could not be appointed to a permanent, full-time post in certain areas of teaching, including art, unless that person held a *Ceard Teastas Gaeilge* (a certificate of competence in the Irish language) or had an equivalent qualification recognised by the Minister. Candidates from outside Ireland could be exempted from the Irish language requirement provided that there were no other fully qualified candidates for the post;

[2] On 26 June 1979, the Minister issued Circular Letter (No. 28/79), which provided that appointees for permanent, full-time posts could be required to undergo a special oral Irish examination. The appointment would not be made unless the selected candidate passed the Irish examination but, once again, the Minister reserved the right to exempt candidates from this requirement where there were no other fully qualified candidates for the position.

Irish language is the national and first official language of the State, according to Article 8 of the Irish Constitution; the English language is recognised as a second official language.

The applicant first requested that the linguistic competence requirement be waived in her case, on the grounds that she would not be required to teach any courses through the medium of the Irish language after her appointment, but her petition was refused. She then followed a four week beginners' Irish course, proceeding to take, but fail, the oral Irish examination. At this point, she wrote directly to the first respondent, asking once again that the language requirement be waived. The Minister replied that this was not possible in her case since other fully qualified candidates had applied for the position. The applicant initiated proceedings for judicial review of the Minister's decision in the Irish High Court, asserting that the administrative procedures enacted were contrary to the principle of the free movement of workers under EC law (Article 48 EEC) and, in particular, to Regulation 1612/68, Article 3(1) of which provides as follows:

Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

- (i) where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable to their own nationals; or
- (ii) where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

This provision shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.

The High Court, in turn, referred the following questions to the European Court of Justice, for preliminary ruling under Article 177 EEC:

1. Where provisions laid down by law, regulation or administrative action make employment in a particular post in a Member State conditional upon the applicant having a competent knowledge of one of the two official languages of that Member State, being a language which nationals of other Member States would not normally know but would have to learn for the sole purpose of complying with the condition, should Article 3 of Regulation (EEC) No. 1612/68 of the Council be construed as applying to such provisions on the ground that their exclusive or principal effect is to keep nationals of other Member States away from the employment offered?

2. In considering the meaning of the phrase "the nature of the post to be filled" in Article 3 of [the Regulation], is regard to be had to a policy of the Irish State that persons holding the post should have a competent knowledge of the Irish language where such knowledge is not required to discharge the duties attached to the post?

3. (1) Is the term "public policy" in Article 48(3) of the EEC Treaty to be construed as applying to the policy of the Irish State to support and foster the position of the Irish language as the first official language?

(2) If it is, is the requirement that persons seeking appointment to posts as lecturer in vocational educational institutions in Ireland, who do not possess "An Ceard Teastas Gaeilge, shall undergo a special examination in Irish with the view to satisfying the Department of Education of their competency in Irish, a limitation justified on the grounds of such policy?"³²

The applicant argued that while the exclusion of non-nationals from lecturing positions was not the exclusive or principal aim of the national measures, it was, in reality, their principal effect. She also stressed that the phrase 'nature of the post to be filled' amounted to a derogation from Article 48 EEC; as such, it should be interpreted narrowly to apply only to cases where linguistic competence related directly to the exercise of duties after the appointment. While not opposed to the cultural and linguistic policies of the Irish State *per se*, the applicant argued that these policies could not be used to justify the negation of Article 48 EEC and Regulation 1612/68.

The Irish Government sought primarily to establish that the linguistic requirement in question *could* be justified 'by reason of the nature of the post to be filled'. No attempt was made to exhibit an illusory status for the Irish language: it was acknowledged openly that Irish is *not* spoken by all Irish people. The submissions focused on the more abstract properties of language; it was argued in particular that the Irish language "...is central to the identity of the Irish State."³³ The policies of successive governments to preserve and promote the Irish language were interpreted as a corollary of its constitutional status. The education system had been and remained the principal domain affected. It was argued that, in consequence, competence in the Irish language was central to teaching appointments. This

³² *supra* note 29, pp. 3969-3970.

³³ *ibid.*, p. 3971.

argument was further developed, somewhat creatively, to justify the language requirement in a situation such as that faced by the applicant, where instruction was not actually provided through the medium of Irish. The Government submitted that "...Irish will never become a living language if it is treated simply as a school subject. It would be an abandonment of its policy if the State did not attempt to create a supportive environment for the use of Irish outside formal classes. In [this respect] the requirement that all teachers have a knowledge of Irish is fair and reasonable."³⁴ It was stressed that the direct and indirect influence of teachers on their students cannot be distinguished in this context. As regards the applicant's assertion of indirect discrimination, the Irish Government argued that competence in Irish was required for both nationals and non-nationals.

The Irish Government never claimed that EEC rules simply did not apply to its domestic language policy. This is somewhat unusual, as it is usually observed that "[w]herever it is alleged that a measure taken by a Member State is contrary to one of the basic prohibitions of the Treaty...[the] first line of defence should be to assert that the measure under attack does not fall within the scope of the Treaty."³⁵ In this case, the Government accepted that the applicant's rights under Article 48 EEC and Regulation 1612/68 *were* relevant, but argued that these rights had not been infringed. In support of this contention, it was stressed that "...the exclusive or principal effect of the circular letter is not to exclude non-Irish nationals from full-time posts but rather to ensure that the persons engaged are suited for those posts."³⁶ Moreover, competence, not fluency, was the required standard and other non-Irish nationals had already passed the oral examination.³⁷ It was also argued that even if

³⁴ *ibid.*, p. 3972.

³⁵ AnneMarie Loman, Kamiel Mortelmans, Harry Post and Stewart Watson, *Culture and Community Law: Before and After Maastricht*, (Boston: Kluwer Law and Taxation Publishers, 1992), p. 23.

³⁶ *supra* note 29, p. 3973.

³⁷ It was noted that from a total of six non-Irish nationals (including the applicant) who had taken the oral Irish examination, four had passed at the first attempt and another on the second attempt; the applicant was, at that time, the only non-national who had failed the examination.

the Court found discriminatory treatment in this case, the language requirement fell within the public policy exception in Article 48(3) EEC. As a final statement, the Government argued as follows:

[A] condition requiring knowledge of the national language of the host country, applied in a manner proportionate to the intended objective and without discrimination as regards nationality, is in the public interest since it is pursuing an objective (the maintenance of cultural diversity in the Community and respect for linguistic pluralism) which is worthy of being recognised and furthered by the Community authorities...The Community institutions must respect a Member State's choice of its national language or languages and the measures suited to giving effect to that choice.³⁸

In one respect, it is surprising that this latter theme was tacked on as an addendum since it encapsulates the pivotal issues of this case. But it should be remembered that, apart from covert references in *Mutsch*, the Court of Justice had never pronounced on the compatibility of Member State language policies with Community law. The Irish government could not have predicted whether the ECJ would be receptive to such arguments and, thus, avoided forcing an unfavourable determination of the issue. The strongly-worded submission of the French Government, in contrast, highlights the political sensitivity of language questions:

[A] condition requiring a knowledge of the national language of the host country is legitimate. Ireland is entitled to adopt measures to ensure that Irish is respected and used in conformity with its constitution...*No provision of Community law can preclude those rights*...The desire to achieve plurilingual communities is an imperative reason which must justify a language requirement of the kind at issue. The maintenance of cultural diversity in the Community and respect for linguistic pluralism enrich both the Community and the Member States. Those fundamental principles have been clearly affirmed by the Community, both in the Parliament and in the Council.³⁹

In light of France's rigorous language policy, outlined in Appendix I, it is not surprising that the French Government sought to defend national competence in language policy formulation. But it does not necessarily follow that autonomous control of domestic language policy corresponds with the promotion of linguistic diversity. It is ironic, for example, that the French Government, which had refused

It was also noted that there were 1723 Irish nationals teaching in vocational education establishments, compared with 189 nationals from other Member States.

³⁸ *supra* note 29, p. 3974.

consistently to recognise minority languages such as Breton and Occitan, referred to the work of the European Parliament, which, as seen *supra*, has been concerned primarily with languages that do *not* have official status at national level.

(ii) Judgment of the Court

In line with the approach adopted by the Irish Government, the Court first addressed the second question referred *i.e.* whether the 'nature of the post' in question justified the imposition of an Irish language competence requirement. The Court reasoned that if this question was answered in the affirmative, the outstanding issues of discrimination (question one) and public policy (question three) would not be relevant.

The Court confirmed that while the applicant's position as an art teacher did not require her to give instruction through Irish, "...that finding is not in itself sufficient to enable the national court to decide whether the linguistic requirement in question is justified 'by reason of the nature of the post to be filled'..."⁴⁰ The Court placed particular emphasis on the constitutional status of the Irish language and on the continuing policies of successive governments to maintain and promote the language. In a key statement, the Court declared that "[t]he EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and first official language. However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers."⁴¹ Several aspects of the Court's decision hinge on this brief paragraph. First, the Court confirmed that language policies were, in general, a matter of Member State competence. Second, particular emphasis was placed on the constitutional status of Irish, as national and first official language of the State, to justify the implementation of language policies. But most remarkably, in contrast to the non-interventionist arguments put forward by the French Government,

³⁹ Observations of the French Government, 1 April 1988, *ibid.* p. 3973; see also McMahon, *supra* note 30.

⁴⁰ Judgment of the Court, *ibid.*, p. 3992, para. 16.

the Court clearly envisaged a role for the Community in this field, to ensure that domestic polices did not negate rights gained under Community law. To this end, it was held that requirements imposed by national language policies “...must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States.”⁴² The Court did not apply these tests to the facts of the present case in any great detail; it was satisfied, however, that the language requirement challenged was legitimate. The decision was based on an understanding that teachers fulfill both direct and indirect teaching roles. It was also stressed that the level of linguistic knowledge required was proportionate to the language restoration objective pursued by the Irish Government.⁴³

The second question referred to the Court was, therefore, answered in the affirmative, *i.e.* the linguistic requirement *was* justified by reason of the nature of the post to be filled. The Court did provide examples of situations that *would* amount to discriminatory treatment, such as the Government’s insisting that the linguistic knowledge be acquired in Ireland only or preventing non-nationals from re-taking the examination.

(iii) Commentary

McMahon summarises the reasons behind the Court’s decision that the Irish language requirement was neither disproportionate nor discriminatory as follows:

- the standard required was competence in the language, not fluency;
- other non-Irish nationals had taken and passed the examination;
- non-Irish nationals could re-take the examination when applying for another permanent teaching position;

⁴¹ *ibid.* p. 3993, para. 19.

⁴² *ibid.*

⁴³ The Court did not discuss explicitly the competence/fluency distinction: this argument is examined *infra* in the context of the Advocate General’s Opinion.

- Irish language competence was a necessary requirement for both nationals *and* non-nationals and did not, therefore, constitute discrimination;
- non-nationals could learn Irish in other Member States as well as in Ireland;
- non-nationals could be exempted from the examination where there were no other fully qualified candidates for the position.⁴⁴

The Court did not analyse these factors in any detail but asserted instead that their *absence* would render a language requirement disproportionate and/or discriminatory. In particular, the Court did not rely expressly on the competence/fluency distinction at any point in its judgment: in this context, the submission of the Commission and the opinion of Advocate General Darmon contain the more detailed analyses often attributed incorrectly to the Court. It referred only to the fact the level of knowledge demanded should not be disproportionate in relation to the objective pursued.⁴⁵ Significantly, the Court linked the requisite language standard to the aims of national policy rather than to the position of employment itself. The implications of the case for minority language policy are considered in the following paragraphs.

(a) The 'nature' of the teaching position

The Court's decision in *Groener* rested entirely on its interpretation of teaching functions yet the conclusion it reached on this point is one of the most questionable aspects of the judgment. The applicant had argued that if she was appointed on a permanent, full-time basis, her duties would not differ substantively from those she was already carrying out as a part-time teacher. In particular, she stressed that she would not be required to actually use the Irish language in her new position. Thus, her appointment had been made conditional on knowledge of a language that was not used in the fulfillment of her duties. This apparent paradox was addressed directly by Advocate General Darmon:

⁴⁴ McMahon, *supra* note 30, p. 134.

The District Magistrate's Court in Bolzano, Italy, has recently referred a question to the Court of Justice, concerning a legislative requirement that language competence tests can only be taken in that region. The applicant has argued that this is contrary to EC law (Case C-281/98 *Angonese v. Cassa di Risparmio*, reference lodged in the Court of Justice on 23 July 1998); this interpretation would appear correct in light of the Court's decision in *Groener*.

[I]t does not seem to me necessary to embark upon a complex analysis to ascertain whether lack of knowledge of the Irish language may in fact create difficulties in the efficient teaching of the subject concerned for - and we are now at the heart of the matter - *it is a question of drawing a line between the powers of the Community and those of the Member States and of considering whether or not a policy of preserving and fostering a language may be pursued, having regard to the requirements of Community law.* The Regulation attempted to reconcile those apparently conflicting requirements by excluding conditions relating to linguistic knowledge from the scope of the principle of non-discrimination when the nature of the post to be filled requires such knowledge.⁴⁶

This interpretation relates the particular facts of *Groener* to its broader context. But it is clear that, in any event, the wording of the Regulation ('the *nature* of the post to be filled') was open to a liberal construction, put forward by the Irish Government and accepted ultimately by the Court. Stricter wording could have specified that the language(s) must be actually used during the course of the employment but this cannot be derived from the actual phrase in the Regulation. As the Court reasoned, determining that a language is not required for the performance of the duties of a post is *not* the same as determining that knowledge of the language cannot be justified by the *nature* of the post.⁴⁷ In this context, Advocate General Darmon identified two conditions that must be present before the 'nature of a post' exception can apply: "[f]irst, the language requirement must meet an aim and, secondly, it must be strictly necessary in order to achieve that aim."⁴⁸ Irish language policy was subsequently adjudged to fulfill both criteria, the latter condition being related to the concept of proportionality.

Alternative examination structures were considered *e.g.* acquisition of the language *after* appointment, but the Advocate General was not convinced that this option would be effective: "[f]irst, the learning of the language would not be immediate and secondly, the teachers involved would undoubtedly be less conscious of the necessity

⁴⁵ Judgment of the Court, *supra* note 29, p. 3982, para. 21.

⁴⁶ *ibid.* p. 3980, para. 11 (emphasis added).

⁴⁷ *ibid.*, p. 3981, paras. 15, 16.

⁴⁸ *ibid.* p. 3983, para. 26.

of having a knowledge of the Irish language.”⁴⁹ This reasoning is not, however, persuasive. Even where a non-national studies a language prior to appointment, acquisition of the language could not be considered ‘immediate’: language acquisition is an ongoing process and never immediate. Second, the Advocate General does not address the possibility of *retaining* the examination structure, but allowing the examination to be taken after appointment; if any appointment remains ultimately contingent on proof of language competence, then it hardly matters whether the examination is taken before or during that employment, particularly in cases such as *Groener*, where an appointee is not necessarily required to carry out their duties through the language studied. An employee whose continued appointment depends on passing an examination is not going to be any ‘less conscious’ of acquiring the relevant language(s).

The Advocate General contemplated education in an even broader sense in the following key paragraph, introducing the terminology of language rights. This extract also elaborates on why performance of teaching duties through Irish was not necessary in order to justify language competence as a precondition of appointment:

Once a constitution...recognises the existence of two official languages without limiting their use to specific parts of the national territory or to certain matters, each citizen has the right to be taught in those two languages. The fact that only 33.6% of Irish citizens use the Irish language is no justification for sweeping away that right altogether, for its importance is measured not only by its use but also by the possibility of preserving its use in the future...*To limit the requirement of a knowledge of Irish to posts involving the actual teaching of Irish would be to treat it as a dead language like ancient Greek or Latin and as a language incapable of further development...* Every Irishman has the right - enshrined as we have seen in the Irish State’s most fundamental legal instrument - to be taught any subject at all, including painting, in Irish if he so desires. Whatever the official language used in educational institutions, a State is entitled to ensure that any citizen can express himself and be understood in another language, which is also an official language and which is also a repository of and a means of transmitting a common cultural heritage.⁵⁰

This is a remarkable passage. The Advocate General identified the right of a citizen to be educated through a minority language and based his reasoning not only on the

⁴⁹ *ibid.*

⁵⁰ Opinion of Advocate General Darmon, *supra* note 29, pp. 3982-3, paras. 21-24 (emphasis added).

fact that the language was recognised constitutionally, but also that it was a means of cultural transmission. He has assumed a correlative state duty to provide education through Irish where this is sought. The delineation of state duty in respect of language groups is a controversial issue, both internationally and nationally: in Ireland itself, for example, the extent of state duty generated by the constitutional protection of Irish is by no means settled internally.⁵¹

The Court of Justice did not follow this line of analysis and did not, therefore, have to address the issue from the perspective of citizens' rights. McMahon remarks that "[t]o base it on the citizen's right might have opened up too many possibilities and created too great a loophole for self-regulation by national governments."⁵² But it is equally arguable that while too many possibilities would indeed have been created, they would have been in the context of *removing* absolute self-regulation from the Member State governments, based on an objective declaration of citizens' language rights according to international rather than national standards. In *Groener*, the Court of Justice focused more on state powers than on state duties, but the idea of citizenship in a European context had not yet been incorporated into EC law. Furthermore, the concept of Community-based fundamental rights more generally, discussed in Chapter 5 *infra*, had not yet fully evolved. In this political context, the idea of taking self-regulation away from the Member States would have been unthinkable, despite the seemingly radical *dicta* in *Mutsch* on the role of the Community in the furtherance of individual rights.

McMahon notes yet another implication of the Court's approach to teaching functions, arguing that "[i]t is by no means certain whether a similar requirement would be justified in the case of nurses, doctors, postmen, lawyers, or others."⁵³

⁵¹ cf. Niamh Nic Shuibhne, "The Constitution, the courts and the Irish language" in Tim Murphy and Patrick Twomey (eds.), *Ireland's Evolving Constitution 1937-1997: Collected Essays*, (Oxford: Hart Publishing, 1998), 253-263.

⁵² McMahon, *supra* note 30, p. 137.

⁵³ McMahon, *supra* note 30, p. 136.

In summary, the Advocate General relied heavily on the phrase ‘nature of the post’ to construe a broad interpretation of the functions carried out by teachers. This was tied into a philosophy of language education rights. Once the possibility that a citizen had a right to be taught any subject through the medium of Irish was established, by referring to Irish constitutional law and government cultural policy more generally, the State could justifiably require teachers to demonstrate Irish language competence, even those who did not teach through Irish on an ongoing basis. The mere potentiality of the citizen’s right being taken up was deemed sufficient to justify the broader policy measure. It is clear that the Court was influenced by this analysis in its construction of direct and indirect teaching duties, but it did not discuss or even mention language rights and correlative state duties. In a sense, this omission makes the Court’s reasoning incomplete, as it appears to have condoned a broad policy measure that was arguably disproportionate in terms of the aim to be achieved. The Advocate General developed a more coherent model for justifying the otherwise disproportionate policy, on the basis of language rights. The Court would have entered murky political waters had it openly adopted his reasoning. But the opinion of the Advocate General must be taken into account to understand the intention behind the Court’s otherwise unsatisfactory interpretation of teaching duties. This interpretation is affirmed in the section dealing with the legal status of Irish, *infra*, particularly in respect of the submission made by the Commission.

(b) The legal status of the language

[This] case relates to one of the most sensitive aspects of cultural identity. The importance of the Court’s reply and its consequences for the Member States and for the diversity of the Community as a whole are so evident that I need not dwell upon them, for at issue here is the power of a State to protect and foster the use of a national language.⁵⁴

Both the Advocate General and the Court relied heavily on the constitutional status of Irish as the national and first official language of the State. Interestingly, neither

⁵⁴ Advocate General Darmon, *supra* note 29, p. 3979, para. 1.

commented on the status of Irish within the Community's official language regime.⁵⁵ The *de facto* status of Irish as a minority language was also ignored. Aside from an acknowledgment that Irish was not spoken by the whole population, the Court took the constitutional position of the language at face value, without any examination of the factual language situation in contemporary Ireland. By classifying Irish as a constitutionally protected national language, the Court was spared from having to consider the particular position of regional and minority languages. In this sense, it is misleading to regard *Groener* as a landmark decision on minority language protection within the Community. McMahon has written that while "[t]hose who favour cultural diversity and national autonomy in these matters were undoubtedly pleased with the [judgment]...[t]heir initial euphoria...might be modified when they note the limits of the Court's decision."⁵⁶ But while the Court does not refer explicitly to minority rights principles, the gist of its decision reflects the implicit influence of this ideology. For example, the Court was aware of the importance of the education system in the implementation of language policy, a central tenet of minority language theory. More generally, the Court acknowledged the validity of language planning as a government objective. The Court did not establish an absolute link between cultural diversity and national autonomy; it is possible, for example, that it may have reacted differently in a situation where the national language was being endorsed in a discriminatory manner, at the expense of minority languages spoken by citizens of that Member State. Finally, while the Court did not articulate a Community policy on minority languages in *Groener*, it is not precluded from doing so in the future.⁵⁷

Minority rights ideology is even more evident in both the submission of the Commission and the opinion of the Advocate General. The Commission did regard

⁵⁵ Irish is a Treaty but not an official language of the EC: *cf.* Chapter 1 *supra*.

⁵⁶ McMahon, *supra* note 30, p. 135.

⁵⁷ McMahon, *ibid.*, points out that the Court failed to address non-linguistic heritage issues, such as the sale/export of national archaeological artifacts, but the limited scope of the questions referred by the national court must be borne in mind in this context.

the language requirement in question as discriminatory, discussed *infra*, but accepted that its imposition could be justified using the 'nature of the post' clause. It considered that three criteria were relevant to establish whether linguistic knowledge could be required in this context: first, where knowledge of the language was required as a practical necessity, irrespective of the language's legal status; second, where the language is generally spoken in the work environment, even though not necessarily for carrying out the job itself; third, on the basis of the language policy of the relevant national authority. The applicant had established that neither the first nor second criterion applied in this case. The Commission focused, therefore, on official language policies and stated that "[a]dynamic policy of fostering and protecting a *minority* language might justify the obligation in question, even if knowledge of that language is not widespread in the relevant Member State."⁵⁸ Thus, the Commission dealt with the actual as well as the legal status of the Irish language. It further consolidated this approach, referring to:

...the importance of Irish as the historical language of the Irish people and the constant policy pursued by the Irish State to re-establish it as a generally spoken language in the face of real threats to its survival. The education system occupies a central role in this policy. Even if the level of knowledge required and the ubiquity of the English language make it unlikely that Irish students can be instructed entirely in Irish, it remains worthwhile to ensure that communication can take place, at least on a one-to-one basis, in the native tongue of the minority language student. *The Community has a general interest in protecting minority languages....*⁵⁹

This paragraph is firmly rooted in minority rights philosophy. The Commission condoned state intervention in situations where a language not spoken by the majority of the population faces 'real threats to its survival'. Moreover, the Commission not only approved of language planning at national level but declared a Community interest. It is surprising to note, then, that the Commission, when forwarding its concluding recommendations, refers only to "...the policy of a Member State to promote an official language..."; it did not mention the minority-based arguments from which it derived its conclusions. This omission reinforces the argument that the Court itself must have been influenced by the status of Irish as a *de*

⁵⁸ Submission of the Commission, *supra* note 29, p. 3975 (emphasis added).

facto minority language, notwithstanding the absence of any direct references to minority rights theory in its judgment.

The antithesis of this position is, of course, that the Court would not have issued a decision in favour of the language requirement *but for* the constitutional recognition of Irish as national and first official language, and that the *de facto* status of Irish as a minority language is entirely irrelevant. On this basis, it is arguable that the Court would have reached a similar decision in respect of any national or official language, such as French in France or English in the United Kingdom. But the Court's reliance on the role of the education system in language policy, which promotes Irish as an expression of culture and identity, has little to do with its constitutional status. This was outlined more explicitly by the Advocate General, who referred to the Arfé and Kuijpers Resolutions to illustrate institutional awareness of minority language issues. In fact, he went further than either the Commission or the Court, in order to reconcile minority-based concepts with the status of Irish as a national language:

Certainly, Irish cannot be described as a regional language. Indeed, the Irish Constitution gives it the status of a national language. However, since it is a minority language, such a language cannot be preserved without the adoption of voluntary and obligatory measures. Any minority phenomenon, in whatever field, cannot usually survive if appropriate measures are not taken.⁶⁰

The Advocate General identified the need to look behind the official status granted to a language, acknowledging that official status *per se* does not necessarily imply linguistic security. By comparison with both the Commission and Court, the Advocate General's opinion is the clearest indication that the legitimacy of Member State language policy is *not* dependent on whether the language has legal status at domestic level. This clarifies further why the measures adopted by the Irish Government were adjudged against the criterion of language preservation, in addition to proportionality and non-discrimination. It is also consistent with the Advocate General's remarks on language policy as a constituent of the preservation of cultural heritage. Finally, it marks a welcome theoretical advance from the

⁵⁹ *ibid.*, p. 3976 (emphasis added).

⁶⁰ *ibid.*, p. 3982, para. 18.

contrasting remarks made in the *Mutsch* decision, on the domestic classification of languages, which are criticised *supra*.

In summary, the Court's acceptance of the 'paper' status of the Irish language was misplaced. It relied considerably on the constitutional status of Irish without any assessment of its limited status as a contemporary vernacular, which would have revealed it to be a *de facto* minority language. The regurgitation of jaded state policies has not yet translated the constitutional status of Irish into successful practice, to the extent that citizens who wish to transact legal and official business through Irish, for example, often do so under considerable disadvantage.⁶¹ But whether satisfactory or not, this constitutional recognition may well have saved the language policies challenged in *Groener*, since an unfortunate consequence of the Court's approach is that minority languages which have been denied similar recognition appear to be excluded from the ambit of its decision. This does not correspond with approach adopted by the Advocate General, who examined the situation of Irish in a real, and not just 'official', sense.

(c) Competence versus fluency

McMahon argues that "...the Court in *Groener* was happy to allow the linguistic requirement because the standard required was not too demanding. Competence, not fluency, was the requirement which was sanctioned by the Court."⁶² But as noted earlier, the Court did not refer expressly to *either* standard and did not, therefore, use this distinction to illustrate what it considered a proportionate language requirement. The difference between competence and fluency was raised by the respondents and was picked up by the Advocate General only. He suggested that "...the level of knowledge required is not so high as to make it impossible for a foreigner to pass the examination."⁶³ Criticism has been leveled at this aspect of the decision, however:

⁶¹ Nic Shuibhne, *supra* note 51; the Irish Government has finally initiated the preparation of language legislation to implement Article 8 of the Constitution, more than sixty years after its enactment.

⁶² McMahon, *supra* note 30, p. 137.

⁶³ Opinion of Advocate General Darmon, *supra* note 29, p. 3983, para. 25.

Without challenging the Court's finding that the Member States have a legitimate interest in pursuing a policy aimed at maintaining and promoting national identity and culture, the outcome [of *Groener*] is not entirely satisfactory from the point of view of the free movement of workers. [The] regulation only allows requirements as to language proficiency to be set where there is a *functional* relationship between knowledge of the language and the function to be fulfilled. In the case of *Groener*, it was *in confesso* that knowledge of Irish was not at all necessary for the performance of the duties concerned...According to the Court, for the national measure...to be compatible with [Community law], the *level* of knowledge required for this purpose must not be disproportionate to that objective. It is submitted that, given the fact that knowledge of...Irish in this case bore no functional relationship to the post concerned, the Court should have applied the proportionality test, not to the level of knowledge required but to the fact that this knowledge was set as an entry requirement as such...This...would have been a solution which was in better proportion to the objective of the Irish Government, at least [for] non-Irish Community nationals. After all, it is not unreasonable to require Irish nationals to learn their language in order to preserve their national cultural heritage, to require Community workers with a completely different cultural heritage to do the same or otherwise refuse them employment is a wholly different matter.⁶⁴

Legitimate concerns have been raised in this extract, but while the Court did not address these issues in the context of level of knowledge required, it had already interpreted teaching functions broadly in respect of 'the nature of the post' criterion. It is not, as discussed *supra*, the acquisition of the language by the teachers themselves that contributes to the preservation of Irish cultural heritage. But the judgment of the Court does not reveal the influence of minority-based ideology on its decision: this omission, though politically necessary at that time, suggests a far more arbitrary and inadequate decision than has been given in reality. Shaw points out that "...measures had been put in place by the Irish Government to facilitate non-nationals surmounting the barrier posed by the Irish proficiency condition [making] it difficult to argue that the principal aim of the provision was truly protectionist..."⁶⁵ Overall, Shaw considers that the Court has identified an implied limitation to the free movement of workers, namely policies promoting cultural diversity and national identity, in addition to the express derogations on grounds of public policy, security and health set out in the Treaty itself.⁶⁶ She cautions, however, against a broad

⁶⁴ Loman *et al*, *supra* note 35, pp. 57-8.

⁶⁵ Josephine Shaw, "Equality of treatment for teachers under European Community law", (1991) vol. 3:1 *Education and the Law*, 35-38 at 36.

interpretation of the implied derogation, in keeping with the narrow interpretation more usually applied to the express limitations in Article 48 EEC. She thus regards the broad interpretation in *Groener* as "...a most unusual position for the Court to take."⁶⁷ Certainly, the Court's approach contrasts sharply with its earlier stance in *Leclerc v. Au Blé Vert*, where it confirmed that derogations from fundamental Treaty rules "...must be interpreted strictly and cannot be extended to cover objectives not expressly enumerated therein."⁶⁸ The Court stated expressly that 'the protection of creativity and cultural diversity' was not mentioned in Article 36 EEC and could not, therefore, be considered as an additional derogation from Community law. Shaw acknowledges that the decision in *Groener* rested on policy grounds, but she does not elaborate on this assertion. It is probable that the Court's emphasis on the validity of policies to preserve and promote constitutionally protected languages applies here. A similar instance of express/implied derogation can be gleaned from the more recent opinion of Advocate General Van Gerven in *Fedicine v. Spanish State*.⁶⁹ This case involved a dispute over the distribution of films in Spain; legislation imposed certain conditions on film distributors in respect of dubbing licences, which meant effectively that films in the official languages of Spain, as opposed to those from third countries, were required to be favoured. The applicants claimed that this infringed their freedom to provide services under Community law. When considering whether the Spanish legislation constituted a legitimate derogation from Community law, the Advocate General noted that "[t]he Court has consistently held that national rules involving discriminatory treatment as regards provision of services from another Member State can be compatible with Community law only if they can be brought within the scope of an express derogation of the Treaty."⁷⁰ He then considered whether Spain could avail of the public policy derogation in Article 66 EEC. Having concluded that this provision did *not* vindicate the Spanish

⁶⁶ *ibid.*, p. 37.

⁶⁷ *ibid.*

⁶⁸ Case 229/83, [1985] ECR I, at 35.

⁶⁹ Case C-17/92, [1993] ECR I-2239.

⁷⁰ *ibid.*, pp. 2257-8, para. 15.

Government, the Advocate General went on to consider "...whether...it is not possible to find in Community law some other ground of justification than public policy, in particular reference to an overriding reason of general importance connected with the protection of the cultural heritage."⁷¹ This approach contrasts directly with the general rule that only express, Treaty-based derogations would be considered. The Advocate General was clearly influenced by the increasing importance attached to cultural heritage in the Treaty on European Union, by then adopted but not yet in force. He quoted from Article 128 EC, in respect of the Community's expected contribution to the 'flowering of the cultures of the Member States' and referred to the new Article 92(3)d EC, on state aid in the cultural domain. He went on to observe that, even before the Treaty on European Union, "[m]any judgments show that the Court too is not insensitive to [cultural] diversity and the specific requirements of policy which the effort to preserve cultural individuality involves."⁷² He then listed a number of instances, including *Groener*, where national cultural policy was deemed to constitute an overriding requirement of general interest that justified the restriction of Community freedoms, once the general tests of proportionality and non-discrimination were satisfied.⁷³ Thus, while the interpretative approach adopted by the Court in *Groener* might well be deemed 'most unusual', it has since been enshrined as a legitimate canon of interpretation in the evolving jurisprudence of the Court of Justice.

(d) The existence of discrimination

Although the Court did not go on to consider whether the Irish language requirement was a discriminatory measure, "[i]t is clear that national measures must always pass

⁷¹ *ibid.*, p. 2259, para. 22.

⁷² *ibid.*, p. 2260, para. 23.

⁷³ Advocate General Van Gerven did not, however, agree that this overriding requirement applied in the present case, "...since it has not been shown that the contested [legislation] seeks in the first place to preserve and promote Spain's own culture." (*ibid.*, p. 2264, para. 28)

muster on this score....”⁷⁴ This confirms further that national language policies are not entirely autonomous and are subject to review by the European Court in respect of their compatibility with EC law, even where the European dimension of the national policy measures is not readily apparent.

The Commission, prior to the initiation of the High Court proceedings and acting under Article 169 EEC, had written to the Irish authorities for information and observations on the applicant’s particular situation. The Commission concluded at that time that the linguistic requirement *was* contrary to certain provisions of the EEC Treaty on grounds of discrimination. The Irish Government had argued that the language test presented difficulties for Irish nationals as well as for non-nationals, since the majority of the population does not speak Irish fluently. The Commission stated, however, that most Irish people had studied the language at school for several years and, while they may not have acquired fluency, this placed them at a clear advantage over non-nationals. Despite accepting that Irish could be studied in Paris, Bonn, Rennes, Brest and Aberystwyth, the Commission concluded that while the aim of the measures was “...to ensure a certain level of competence in the national language, the principal effect is to create a greater obstacle for non-Irish nationals, likely to keep them away from the employment in question.”⁷⁵ This echoes the Court’s decision in *Seco SA and Desquenne Giral SA v. Etablissement d’assurance contre la vieillesse et l’invalidité*, which confirmed that Community law “...prohibit[s] not only overt discrimination based on the nationality of the person...but also all forms of covert discrimination which, although based on criteria which appeared to be neutral, in practice lead to the same result.”⁷⁶ But an important fact, emphasised by McMahon, supports the opposite conclusion in the *Groener* case: “[t]he national rules pre-date by some decades Ireland’s accession to the European Community and this clearly indicates that the rules had a rationale other

⁷⁴ McMahon, *supra* note 30, p. 137.

⁷⁵ *supra* note 29, p. 3975.

⁷⁶ Cases 62 and 63/81, [1982] ECR 223 at 235, para. 8.

than keeping non-nationals away from this employment.”⁷⁷ This point was also stressed by the Advocate General, but Shaw has cast doubt on his reliance on the absence of intention to discriminate as being conclusive in instances of indirect discrimination.⁷⁸ But, in the particular context of *Groener*, statistics submitted by the Irish Government at the request of the Court show that, from a total of one hundred and eighty nine nationals of Member States other than Ireland teaching in the vocational education sector, one hundred and eighty three had been exempted from the language requirement. It is not reasonable to argue, then, that the language requirement has had a dissuasive effect on the employment of non-nationals. The European Court had already held, in *Robert Fearon & Co. Ltd. v. Irish Land Commission*, that “...it is not enough, in order to establish that a particular measure is discriminatory, to show that it has had a greater impact on non-nationals than on nationals, if the measure in question is intended to achieve certain important policy objectives.”⁷⁹ Ironically, it was the Commission that relied on this decision in its own submission in *Groener*, notwithstanding its earlier conclusions on discrimination. Both the Advocate General and the Court pointed out, however, that non-recognition of competence in the Irish language where the language had been studied in another Member State *would* amount to discrimination based on nationality and would not, therefore, be acceptable under Community law. The Court will have the opportunity to clarify this position when it hears the *Angonese* case, referred to *supra*.

(e) The public policy exception

Article 48(4) EEC stipulates that “[t]he provisions of [Article 48] shall not apply to employment in the public service.” This proviso only applies to certain public

⁷⁷ McMahon, *supra* note 30, pp. 137-8.

⁷⁸ Opinion of Advocate General Darmon, *supra* note 29, p. 3981, para. 15; Shaw, *supra* note 65, p. 36.

⁷⁹ Case 182/83, [1984] ECR 3677.

service positions: in *Commission v. Belgium*, the Court of Justice held that the safeguards outlined in Article 48 do not apply to:

...a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality.⁸⁰

On these criteria, it is unlikely that the public service exception could apply to teaching posts. In any event, the Commission pointed out that the Court was never likely to accept the public policy argument, since it would only be relevant where discrimination was shown to exist and where the measures could not be justified by the 'nature of the post' clause. Moreover, the public policy exception, as a derogation from Community law, must be interpreted strictly, "...[presupposing] 'the existence...of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'."⁸¹ The Commission went on to argue that a Member State policy designed to promote an official language was unlikely to fulfill the criterion of a 'fundamental interest of society' in the Community law sense. But this aspect of its submission is questionable, given that the Court relied heavily on the existence of such a policy to justify the language requirement by the 'nature of the post'.

(iv) Conclusion

The *Groener* decision is to be welcomed as recognising the desirability of having a multilingual society in Europe and in allowing Member States a reasonable measure of autonomy in these matters. Cynics might say that the Court recognised the political necessity for such a decision and realised the

⁸⁰ Case 149/79, No. 1, [1980] ECR 3881.

⁸¹ *Groener* judgment, *supra* note 29, p. 3976, referring to Case 30/77 *Boucherau* [1977] ECR 1999.

cultural backlash which would have been inevitable if it had refused to recognise the legality of the Irish measures. In this connection, such critics might point to the narrow approach of the Court in its decision as an indication of the Court's reluctance. A more gracious and generous view, however, might be that we are here witnessing a real recognition of the legitimacy of national concerns in relation to national cultural heritage and a tentative move by the Court towards Community elaborated demarcation guidelines. The bureaucrats and the economists will have to recognise that cultural diversity cannot be indiscriminately swamped in the name of economic unity.⁸²

This paragraph has been extracted from McMahon's concluding remarks on the *Groener* decision. The first perspective, dubbed the cynical view, implies that any positive implications derived from the decision resulted more by accident than by design. The latter approach suggests quite the opposite. Both views display the constraints that existed; the Court was adjudicating on a policy area that it had not previously addressed directly, in the absence of any guidelines from either primary or secondary Community law. The resulting judgment appears incomplete and devoid of reasoning, but it has already been shown that both the submission of the Commission and the opinion of the Advocate General more than remedy this deficit. The Court was undoubtedly aware of the political consequences of its decision in *Groener*. But it did not succumb to the view that language policy remained *entirely* within the realm of exclusive domestic competence, as had been advocated by the French Government. Boch has reasserted this argument, arguing that *Groener* "...establish[ed] that the Community 'hands off' policy is over."⁸³ It is far from clear, however, that a 'hands off' policy could be implied in this domain, since *Groener* marked the first conflict between national language laws and fundamental Community law principles to be resolved by the Court. The 'narrow' approach adopted by the Court can be justified to a certain extent by the limitations of the Article 177 procedure itself, as well as by absence of Community law provisions on which the Court could have based a more general decision on language policies. From the more liberal perspective, McMahon argues that the decision has been 'a real recognition of national concerns in relation to cultural heritage'. Member State

⁸² McMahon, *supra* note 30, p. 139.

⁸³ Christine Boch, "Language protection and free trade: The triumph of the *Homo MacDonaldus*?", (1998) vol. 4:3 *European Public Law*, 379-402 at 391.

language policies must be checked against Community law, but it is the idea of relative national autonomy that prevails in *Groener*. Moreover, the principles of non-discrimination and proportionality are widely applied, on the premise of the protection of fundamental rights, in both national and international law.

As well as being a national and official language, Irish is also a minority language and in most instances, minority language rights are sought *against* the state. The Court's examination of Ireland's language policy would have been more complete had it included a parallel consideration of minority language rights, particularly since this ideology informed the analysis of both the Commission and Advocate General. The Court's reticence to delve further into the substantive content of Member State language policies is explained by de Búrca, in the context of abortion law:

Once the Court of Justice has accepted that the State's aim is a legitimate one of national constitutional importance, that the measure challenged is helpful in pursuit of that aim, that the restrictive effect on the Community interest is small and that that interest is not of the same nature or importance, it would effectively be assuming a legislative role if it conducted a thorough enquiry into what alternative means the state might have chosen to pursue its aim.⁸⁴

The Court deferred considerably to the constitutional status of Irish and acknowledged the pivotal role played by the education system; whether cultural interests surpass economic ones in the Community context is debatable but it could certainly be conceded that the interests are 'not of the same nature', slotting *Groener* into the category described by de Búrca. The consequent functional and jurisdictional limitations on the Court identified by her are thus applicable to this case. Notwithstanding the limitations of the Court's decision, de Witte has observed that, at the very least, it has "...correct[ed] the impression that, from the point of view of market integration, linguistic diversity is not so much a cultural asset as an obstacle to effective communication."⁸⁵ Boch goes further, writing that:

⁸⁴ Gráinne de Búrca, "Fundamental rights and the reach of European Community law", (1993) 13 *Oxford Journal of Legal Studies*, 283-319 at 295-6.

⁸⁵ Bruno de Witte, "Surviving in Babel? Language rights and European integration", in Yoram Dinstein and Mala Tabory (eds.), *The Protection of Minorities and Human Rights*, (Dordrecht: Martinus Nijhoff, 1992), 277-300 at 295.

[T]he ECJ was prepared to go out of its way to accommodate cultural diversity. In its eagerness to promote linguistic diversity as a valued cultural asset, as opposed to an obstacle to mobility, the Court was willing to forego fundamental principle of interpretation. In view of the symbolic importance of its judgment for the promotion of linguistic diversity, the Court is also prepared to endorse the arbitrary character of the national linguistic policy. Ms Groener can be refused a job, because she does not speak a language, which she does not need to speak to do the job. Neither Ms Groener's individual rights nor the needs of market integration require abandoning national linguistic policies. The judgment is all the more remarkable as no reference to national identity or cultural diversity was then included in the Treaty.⁸⁶

C. General Comments on the Jurisprudence of the Court of Justice

The decisions in *Groener* and *Mutsch* have established that Member States are relatively free to determine their linguistic policies; but these policies are subject to review by the Court of Justice in terms of their compatibility with basic Community law. The Court has been careful not to pronounce openly on national language policies, largely because of political sensitivities, but it does appear sympathetic towards minority language rights, albeit more covertly than the European Parliament has been. The Court ensured the exercise of individual minority rights in *Mutsch* and condoned Member State measures in favour of a minority language in *Groener*. Neither decision could be said, however, to demonstrate a coherent EC minority language policy. The Belgian legislative arrangements were not open to assessment in *Mutsch*; in *Groener*, a *de facto* minority language was shielded by its arguably unrepresentative but legally enforceable constitutional status. In both decisions, however, the Advocates General deliberated more openly on the role of the Community in both the cultural and fundamental rights aspects of language issues. This further reflects the awareness within the Community institutions of the value of cultural pluralism but it also highlights the lack of justiciable legal basis, which might have secured the translation of these sympathetic viewpoints into law. Loman, Mortelmans, Post and Stewart draw the following conclusions from the judgment of the Court in *Groener*, despite their reservations, discussed *supra*, on the compatibility of the decision with the free movement of workers:

...*Groener* is remarkable for the approach adopted by the Court in the given legal context. Even though the outcome is open to criticism...the Court did make it clear that it is willing to take account of legitimate interests of the

⁸⁶ Boch, *supra* note 81, p. 392.

Member States concerning their national identity and culture. It is not clear, however, what future or wider implications this judgment will have. The case was decided on a very narrow basis and was wholly concerned with the particular situation of the Irish language. The question thus arises as to whether the Court will be willing to exonerate similar measures [for] other languages of the Community or only to certain languages *e.g.* national languages which can be considered to be minority languages within the Community (Danish, Dutch, Greek or Portuguese) or regional languages (Catalan, Basque, Frisian or Welsh) or only languages which have an official (constitutional) status, such as Irish. It would seem reasonable that the exception admitted by the Court will only be available to lesser used, more peripheral languages, which need a certain amount of protection in order to prevent their becoming extinct.⁸⁷

This paragraph reflects arguments introduced in Chapter 1 *supra*; the Danish and Greek languages might not be seen as 'under threat' when viewed from a national perspective but could well be classified as peripheral in the EC context. Minority languages such as Catalan and Frisian, on the other hand, are peripheral even at national level. But *both* categories merit consideration in language policies at national *and* supra-national level. If the jurisprudence of the Court is to be applied only to languages having constitutional status, then those most in need of protection are effectively excluded; in this sense, the decision in *Groener* goes against its own underlying spirit.

4. CONCLUSION

In general terms, EC Competence has evolved dramatically since the mid 1980s, when the judgments analysed in this Chapter were delivered and when the European Parliament drafted its first minority language resolutions. The following chapters look at three issues in particular - the boundaries of Member State/Community competence, EC cultural policy, and fundamental rights and citizenship - in light of changes introduced by the Maastricht and Amsterdam Treaties. The most recent jurisprudence of the Court of Justice and the continuing work of the Community institutions is then assessed, to see whether the initial Community leanings towards securing effective justice for minority language speakers, evident throughout this

⁸⁷ Loman *et al*, *supra* note 35, p. 66.

chapter, have been articulated and applied more directly in light of enhanced EC competence.

CHAPTER 3

THE DIVISION OF POWERS AND THE PRINCIPLE OF SUBSIDIARITY

1. INTRODUCTION

In any organisation based on a system of shared powers, one of the fundamental issues to be determined is the allocation of competence. As well as the obvious consideration of deciding which level of authority does what, the division of competence also sets limits to the actual and potential powers of the respective authorities. This concept must be formalised to some extent to avoid excessive conflict over alleged *ultra vires* actions. In federal unions, for example, competence is usually delimited explicitly in a written constitution.

Allocation of competence within the European Community is not quite so clear-cut. The objectives of the Community are set out in the amended Treaty of Rome but respective EC/Member State obligations are not listed expressly in the form of a federal constitution. Treaty objectives are not pursued by the Community alone: the Member States must sometimes take action, although, more usually, refrain from taking action, in certain policy areas. This division of powers has become increasingly complicated, as the impact of EC law has widened gradually from the economic objectives set out in the original Treaty. It is arguable that the founding fathers of the European Economic Community never intended to confine its scope to economic issues alone. But it must be conceded that the express assignment of additional EC competence sparked contentious opposition that almost prevented the ratification of the Treaty on European Union (TEU).

Trends towards intensified European centralisation contrast directly with the renewed promotion of national identities within the Community context. Developments such as the increased use of majority voting in the Council have been likened to the

'silencing' of individual Member States.¹ One of the perplexing challenges facing the Community is the accommodation of national diversity in the context of common goals and a shared institutional framework. This concern is reflected in Article F(1) TEU, which provides that the Union is obliged to respect the national identities of the Member States.² Brittan argues that the Community must draw strength from the positive aspects of national identity, such as diversity of history, culture, language and tradition, while challenging the destructive forces of trade barriers, aggressive nationalism and mutual suspicion.³

An additional response to the tensions associated with the division of powers has been the formal introduction of the principle of subsidiarity into Community law.⁴ While the principle may have been adopted to simplify the allocation of competence, two preliminary observations can be made. First, in light of the political discord surrounding its introduction as well as subsequent, and continuing, academic debate, subsidiarity has accentuated rather than alleviated the division of powers conflict. Second, it is difficult to assess whether subsidiarity has had any impact on a practical level. In any event, the principle of subsidiarity and the division of powers more generally have a definite effect on any minority language policy introduced by the Community. To establish a legal basis for action, Community measures will have to be justified in terms of subsidiarity. From the Member State perspective, language is

¹ cf. Theodor Schilling, "A new dimension of subsidiarity: Subsidiarity as a rule and a principle", (1994) 14 *Yearbook of European Law* 203-256 at 207.

Dashwood employs a more extreme analogy, where he likens the Community to "...a Triffid, quietly gaining strength in order to gobble up everything that gives substance to our sense of having separate national identities." (Alan Dashwood, "The limits of European Community powers", (1996) 21 *European Law Review* 113-128 at 113.)

² The reference to *national* identity in Article F(1) TEU may cause some problems for the protection of linguistic minorities and is discussed *infra*.

³ Leon Brittan, "Institutional development of the European Community", (1992) *Public Law* 567-579 at 567.

⁴ The distinction between the competences of the Community and the Union must always be borne in mind: generally, the former are subject to the rules of Community law and to the jurisdiction of the Court of Justice, while the latter are based on an intergovernmental framework: cf. generally Robert Lane, "New Community competences under the Maastricht Treaty", (1993) 30 *Common Market Law Review*, 939-979 at 941-2; Ulrich Everling, "Reflections on the structure of the European Union", (1992) vol. 29:6 *Common Market Law Review* 1053-1077.

a politically contentious issue which is closely bound up with national identity; any resistance to the development of Community policy on minority languages would involve reliance on the principle by either or both levels of authority. This chapter summarises the history and ideology of subsidiarity generally and in the Community context, and then outlines and analyses the principle as ratified by the Maastricht Treaty. The practical implications of the division of powers for projected language policies are assessed in Chapter 4.

2. THE EVOLUTION OF THE PRINCIPLE OF SUBSIDIARITY

A. General History

It may seem unlikely that the origins of a principle of Community law are usually traced to Roman Catholic doctrine. Beale and Geary, however, identify traces of the concept of subsidiarity in the writings of Aristotle, based on his ideal of 'civic existence'.⁵ Aristotle sought to maximise the autonomy of the individual, advocating that, where appropriate, the state should devolve its functions to authorities acting as closely as possible to the citizen. These ideas were adapted to Catholic teaching by St Thomas Aquinas in the Middle Ages. But the most concrete expression of the principle can be found in the 1931 encyclical *Quadragesimo Anno*, written by Pope Pius XI in response to the autocratic political regimes of the 1930s and 1940s. The encyclical argues that while certain functions can only be performed by powerful political entities, "...it would be unjust and socially harmful to withdraw from the lower groupings and confer on a larger entity those functions which the former can well perform themselves."⁶ In addition to censuring higher level entities for arrogating the powers of lower societies, in terms of injustice and 'evil', the encyclical introduces the idea of efficiency, arguing that by dividing functions between levels of authority in a just manner, each level can perform its allocated

⁵ Andrew Beale and Roger Geary, "Subsidiarity comes of age?", (1994) 144 *New Law Journal* 12-14.

⁶ From *Quadragesimo Anno*, quoted by Vlad Constantinesco, "Who's afraid of subsidiarity?" (1991) 11 *Yearbook of European Law*, 33-55 at 34-5; subsidiarity has also been identified in 19th century Protestant socio-political theory: cf. Anne Marie Loman, Kamiel Mortelmans, Harry Post and Stewart

tasks to optimum effectiveness. These basic principles were reiterated in the 1961 encyclical, *Mater et Magistra*. Significantly, this document emphasised the converse idea that larger or higher authorities can perform some functions *more* effectively. Overall, "...intervention of public authorities that encourages, stimulates, regulates, supplements and complements is based on the principle [of subsidiarity]." ⁷ Three fundamental characteristics of subsidiarity can be determined from its elaboration in Catholic doctrine. First, it is essentially a principle to be drawn upon to ascertain the just division of competence in a power-sharing organisation or system. Second, justice requires that decisions and actions must be taken, where possible, at the level of authority closest to individual citizens. Finally, subsidiarity can also justify action at higher levels of authority.

B. History of Subsidiarity in the European Community

The principle of subsidiarity has had a dual significance throughout its evolution, since it can justify action taken at both higher and lower levels of authority. This anomaly explains why the formal introduction of the doctrine into Community law has been supported by those who seek to justify the enlargement of Community powers, as well as by those who are determined to curtail this tendency. ⁸

Commentators are divided on the prevalence of subsidiarity in the history of Community law. In 1990, the *Common Market Law Review* remarked that the term was "....until recently almost unknown." ⁹ Similarly, Toth argues that the structure for competence allocation in the Community before the TEU would have precluded the operation of subsidiarity. ¹⁰ In contrast, it has also been argued that subsidiarity has

Watson, *Culture and Community Law: Before and After Maastricht*, (Boston: Kluwer Law and Taxation Publishers, 1992), pp. 202-3.

⁷ *Mater et Magistra* (Pope John XXIII, 1961), quoted in (1967) 13 *New Catholic Encyclopaedia* 762.

⁸ cf. Constantinesco, *supra* note 6, p. 35; Deborah Z. Cass, "The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community", (1992) vol. 26:6 *Common Market Law Review*, 1107-1136 at 1112.

⁹ Editorial Comments, (1990) vol. 27:2 *Common Market Law Review*, 181-184 at 181.

been a guiding, if implicit, principle throughout the evolution of Community law.¹¹ This view is summarised by Berman, who notes that "...while the rhetoric of subsidiarity is unprecedented in the community, the practice of subsidiarity is not."¹² It is submitted, however, that the converse of this argument is more correct. Debates on European integration throughout the history of the Community have incorporated references to subsidiarity to some extent but most of these documents were never enacted. The Single European Act did employ the principle in the context of environmental protection (Article 130r(4) EC), but references to subsidiarity prior to Maastricht were usually confined to ideologically loaded rhetoric, subsisting on the political rather than the practical level.

Although it has been argued that there are tacit references to subsidiarity in the Treaty of Rome,¹³ the first express reference can be found in the Commission's Report on European Union, in 1975.¹⁴ The Report is one of the first blueprints for the creation of 'an ever closer union' among the peoples of Europe, as anticipated by the Preamble to the Treaty of Rome. Van Kersbergen and Verbeek note that subsidiarity was promoted as a mechanism for *widening* the competences of the European Economic Community at this stage.¹⁵ This can be better appreciated against the background of the prevailing Christian Democratic ideology which, adapting the tenets of Catholic philosophy, focused on the assisting role of higher authorities in the specific context of the welfare state. One of the primary characteristics of the Christian Democratic view of subsidiarity was the temporary duration of its legitimate application. It was stressed that Community intervention was a dynamic

¹⁰ A.G. Toth, "The principle of subsidiarity in the Maastricht Treaty", (1992) vol. 29:6 *Common Market Law Review* 1079-1105; this idea is discussed *infra* in the context of exclusive and concurrent powers.

¹¹ *cf.* for example, Cass, *supra* note 8, pp. 1110-1128; Constantinesco, *supra* note 6, pp. 42-49.

¹² G.A. Berman, "Taking subsidiarity seriously: Federalism in the European Community and the United States", (1994) 94 *Columbia Law Review*, 331-456 at 342.

¹³ See note 11 *supra*.

¹⁴ Submitted to the Council, 26 June 1975; Supplement 5/75 Bull.EC, especially pp. 10-11.

concept, valid but ephemeral. In terms of taking decisions close to the citizen, Christian Democratic ideology focuses on assisting the weaker groups in society: It is especially significant that this interpretation of subsidiarity focused on the achievement and maintenance of a pluralist or *diverse* society.

The 1975 Report outlined the competence of an envisaged new entity, a 'European Union', in terms of the *principe de subsidiarité*. The union would act as lawmaker only where individual Member State action would not yield optimum efficiency, or where centralised policies were necessary to ensure cohesion. But the architecture of the proposed union differed from Christian Democratic theory in one crucial respect: subsidiarity, as outlined in the Report, was not a dynamic concept but was presented as a static formula, applicable only at the initial allocation of union/Member State competence. This divergence reflects the influence of federal theory, particularly German federalism. The German approach to subsidiarity is more acutely concerned with the idea that decisions be taken at lower levels of authority where appropriate. More specifically, the German *Länder* feared that the autonomy of sub-national authorities would not be respected in any new European developments.¹⁶ As noted, the division of competence is outlined expressly in federal constitutions: subsidiarity is not, therefore, a dynamic, guiding principle to be invoked on a continuing basis. A strict application of this theory would not have been appropriate, given the inherently dynamic character of European integration itself, but certain characteristics of the proposed union did reflect the federal approach. It was intended, for example, that a new treaty would ratify an Act of Constitution as the legal basis of the union.¹⁷ Union competence could be exclusive, concurrent or potential, and would be specified as such in the treaty. The principle of subsidiarity would be relevant to concurrent competence *i.e.* where both the union and the Member States would have

¹⁵ Kees Van Kersbergen and Bertjan Verbeek, "The politics of subsidiarity in the European Union", (1994) vol. 32:2 *Journal of Common Market Studies*, 215-236 at 216.

¹⁶ The relevant provisions of the Basic Law of Germany are Articles 72-74, which set out the legislative competence of the *Länder* and Federation respectively; in particular, Article 72GG outlines the application of the principle of subsidiarity.

¹⁷ *cf.* Toth, *supra* note 10, pp. 1088-9.

competence to act but the union would act, in accordance with subsidiarity, where collective action was deemed more efficient or appropriate in light of the objectives to be achieved. It should be stressed, however, that whether or not an area of competence was exclusive or concurrent would already have been clearly set out in the proposed treaty, in line with a federal application of subsidiarity. Thus, competing ideologies had been shrewdly incorporated into the Community perspective on subsidiarity *ab initio*, confirming the flexibility already exhibited in the philosophical and religious origins of the principle.

The evolution of subsidiarity in the Community context continued with the European Parliament's Draft Treaty on European Union, in 1984.¹⁸ But the earlier emphasis on its 'widening' capacity had rather subtly shifted towards its alternative 'limiting' function, in respect of challenges to centralised policy-making. Once again, the Draft Treaty viewed the proposed union as an entirely new legal entity, replacing the existing Communities. It was envisaged that a constitutional act would set out precisely the competence of the union and of its Member States. Once again, competence was classified as either exclusive or concurrent, but the Draft Treaty did not contain any 'lists' of powers, as envisaged in the 1975 Report. Instead, the nature of competence was clearly and individually outlined for each area of legislative activity identified in the Draft Treaty. The first explicit reference to subsidiarity is in the Preamble, where it was noted that the institutions of the Union would be attributed "...in accordance with the principle of subsidiarity, with those powers required to complete successfully the tasks they may carry out more successfully than the states acting independently." Article 12 provided as follows:

Where this Treaty confers exclusive competence on the Union...national authorities may only legislate to the extent laid down by the law of the Union....The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers. A law which initiates or extends common action in a field where action has not been taken hitherto by the Union or by the Communities must be adopted in accordance with the procedure for organic laws.

¹⁸ Adopted 14 February 1984, [1984] OJ C-77/33.

Thus, Article 12 codified specific guidelines for the application of subsidiarity in the new union, including the 'effectiveness' and 'dimension or effects' criteria. In many ways, however, Article 12 raised more questions than it answered. Who exactly would determine these criteria?¹⁹ Would the principle be justiciable?

Significantly, the fundamental 'close to the citizen' criterion was not prioritised in this construction of subsidiarity. Sub-national authorities were not mentioned, generating the assumption that in the new union, the entities 'closest' to citizens were the Member States.

C. Theories of European Integration and the Idea of Federalism

The 1984 Draft Treaty was quite a radical document which challenged the existing structure of the European Communities in a fundamental way.²⁰ The Member States were neither prepared nor willing to contemplate such a drastic acceleration in the evolution of European integration. But the introduction of the Draft Treaty, as well as the accompanying debate and discussion, forced the contemplation of two issues: first, what alternative form could intensified European integration take and, second, how could growing concerns about centralisation, increasingly prevalent among some Member States, be accommodated without thwarting this process of integration? In this context, various theories have been developed to explain the dynamic of European integration. The path from European Economic Community to European Union is marked by a number of framework developments, most notably the Single European Act and the Treaty on European Union. The legal and institutional changes implemented by these treaties reflect the various stages of European integration. Notwithstanding the express commitment to pursuing an 'ever closer union' in the Preamble to the Treaty of Rome, the forces of integration have evolved somewhat independently of legitimising structural developments.

¹⁹ Cass, *supra* note 8, assumes that this function would have been within undertaken by the Council, given the role attributed to the Council in Article 11, which deals with policy areas subject to 'common action'.

²⁰ Particularly in terms of proposed institutional reform and the cession of national sovereignty: cf. Everling, *supra* note 4, pp. 1053-1056.

Significantly, theories of European integration have often been based on the same underlying assumption as the principle of subsidiarity *i.e.* identifying the optimum level of authority at which certain functions should be performed.²¹

The momentum behind European integration was initially explained on the premise of functionalism.²² This theory focuses on 'needs'; in particular, needs that transcend national boundaries and which could, therefore, be provided for effectively by establishing some form of joint government. In line with the inherent characteristics of functionalism, the resulting government entity would be task-specific in the initial stages but its structure would be potentially flexible, both in terms of membership and assigned subject matter. But this concept of flexibility, central to functionalist theory, did not correspond so well with the developing European Communities, in that a loosely-based opt-out system would not have met the requirements of the metamorphosis from economic to political organisation. The main contribution of functionalism, then, was the promotion of the *possibility* of positive interdependency between sovereign states, based on appreciation of the advantages of co-operation. Critics of the theory were quick to point out, however, that co-operation did not necessarily alleviate the strain of inter-state contact. It was argued that it was merely the issues which had changed, from territorial disputes to trade, but not the underlying political tensions.²³

Despite the shortcomings of functionalism as an explanatory framework, the reality of intensified Community integration had become apparent. To redress the theoretical deficit, the concept of neofunctionalism was developed. More normative in character than its predecessor, neofunctionalism provided for a fixed supranational authority and for appropriate central institutions. As has occurred in the European

²¹ *cf.* Martin Holland, *The Community Experience*, (London: Pinter, 1993), p. 14.

²² *cf.* David Mitrany, "The functional approach to world organisation" in C.A. Cosgrove and K.J. Twitchett (eds.), *The New International Actors: The United Nations and the European Economic Community*, (London: Macmillan, 1970), 65-75.

²³ Holland, *supra* note 21, p. 15.

Community, integration would begin in the economic sector, leading to the growth of solidarity among the Member States. It was argued that this in turn would automatically lead to intensified integration. Initially, the process would occur without mass support, again emphasising the automatic or inevitable character of integration, but, eventually, popular support would ensue. The central premise of neofunctionalism is the idea of 'spillover': this means that integration in one sector, such as the economic sector, will inevitably produce advantages and disadvantages in other sectors. Centralised competence, corrective where appropriate, will then inevitably 'spill over' into other policy spheres. It was noted in Chapter 1 that de Witte uses neofunctionalism to explain early Community intervention in minority language issues.²⁴ In this way, the new Community competence in the fields of culture and education, for example, which were eventually introduced by the TEU, merely formalised the preceding occurrence of spillover. Once again, however, these theoretical conjectures did not correspond with European integration in practice. Essentially, neofunctionalism assumed that the spillover effect was absolutely inevitable: the "...persistence of national self-interest..." was not taken into account.²⁵ The unfulfilled potential of the pro-integration climate in the 1960s illustrates this flaw. But for present purposes, the contemporary restatement of neofunctionalist theory cannot be underestimated in the context of the politics of subsidiarity. As noted earlier, the concepts of functionalism and neofunctionalism were similar to a broad interpretation of subsidiarity, in that joint or collective authorities were seen as the appropriate actors for dealing with policies having a transnational character. European integration had become a practical reality. The idea of a 'federal' Europe was being advanced, in terms of dividing powers and competence between the Community and its Member States. Emiliou describes federalism as "...a mode of political organisation that unites separate states or other polities within an overarching political system [while allowing] each to maintain its own fundamental political integrity."²⁶ In addition, he notes that federalism strives to achieve the ideal

²⁴ Chapter 1 *supra*, p. 32.

²⁵ Holland, *supra* note 21, p. 17.

of unity in diversity. Certain aspects of European integration were formulated along these lines, including the eventual adoption of subsidiarity.²⁷ But the notion of 'inevitability', the idea that Europe was ultimately heading towards the model of a federal state with consequences for virtually every policy area, was unacceptable, in varying degrees, to the majority of the Member States. The resulting reformulation of neofunctionalist theory thus coincides to a large extent with the supremacy of a third ideology of subsidiarity *i.e.* adapting subsidiarity as a counter-centralist theory, usually associated with British Conservatism. This approach differs from that of the German federalists in that it does not focus on sub-national authorities versus *any* higher authority level, but on the sovereignty of Member States in the Community institutional context. Any assumption of inevitable or automatic integration not founded on a negotiated treaty framework is anathema to this third ideology. The principle of subsidiarity reinforces the competence of Member States in their role as authorities 'closer to the citizen' in the majority of policy areas. Community intervention is justifiable only where efficiency and cross-boundary concerns clearly merit collective action (essentially, measures based on the four freedoms of the single market).

Thus, contemporary neofunctionalist theory accepts a more limited application of the fundamental logic of spillover: it is acknowledged that collective action in one sector will ordinarily affect the *status quo* in other policy areas. But instead of conceding automatic corrective Community competence for these peripheral domains, there has occurred instead "...a recognition that a prerequisite to any form of spillover

²⁶ Nicholas Emiliou, "Subsidiarity: An effective barrier against 'enterprises of ambition'?", (1992) 17 *European Law Review*, 383-407 at 385.

²⁷ *cf.* John Temple Lang, "European Community constitutional law: The division of powers between the Community and Member States", (1988) vol. 39:2 *Northern Ireland Law Quarterly*, 209-234 at 209, on the similarities and differences between the Community and federal systems. Both share judicial review of Member State actions, central authorities whose legislation applies directly to citizens, supremacy of central legislation in cases of conflict and division of competence. The main difference relates to legal basis; the Community is founded on a framework treaty while most federal systems are based on written constitutions.

The incorporation of subsidiarity into the European framework is usually described within the context of 'co-operative federalism': *cf.* Lane, *supra* note 4, p. 977; this concept is considered further *infra*.

(economic or political) is a successful intergovernmental bargaining process.”²⁸ While the interrelated effects on various policy areas may themselves be considered an automatic consequence of organised collective action, the acquisition of centralised competence to deal with these effects is not. Rather, competence to act is dependent on the formulation of an explicit legal basis. Spillover is no more than an external catalyst in the initiation of negotiations, based on an express political will that the Community should proceed towards intensified integration. In this context, the principle of subsidiarity is biased in favour of individual Member State action in any areas where the question of competence is unclear. Understanding these diverse ideological bases for subsidiarity is a necessary background to an assessment of the implementation of the principle in Community law, discussed *infra*. It can be noted at this point, however, that there remains a certain degree of scepticism, indeed cynicism, on the contribution of subsidiarity to European integration more generally.²⁹

D. The Codification of Subsidiarity in Community Law

The framework documents discussed *supra* (1975 Commission Report, 1984 Draft Treaty) have two features in common. First, they were never implemented; second, their drafters had contemplated an entirely different model of integration than that which has been achieved in practice. Thus, it is misleading to speak of the codification of subsidiarity in Community law as an ongoing process that culminated with the Single European Act and the Treaty on European Union.³⁰ The history and

²⁸ Holland, *supra* note 21, p. 18; reformulation of neofunctionalist theory is largely attributed to R.O. Keohane and S. Hoffman; cf. “Community politics and institutional change”, in W. Wallace (ed.), *The Dynamics of European Integration*, (London: Pinter/RIIA, 1990), 276-300.

cf. also, David Mutimer, “1992 and the political integration of Europe: Neofunctionalism reconsidered”, (1989-1991) vol. 13:1 *Journal of European Integration* 75-101.

De Witte places relates this change in attitude directly to the subsequent promotion of identity ‘as an integrative factor’: cf. Bruno de Witte, “Building Europe’s image and identity”, in A. Rijksbaron, W.H. Roobol and M. Weisglas, *Europe from a Cultural Perspective: Historiography and Perspective*, (The Hague: Nijgh en von Ditmar Universitair, 1987), 132-139 at 135.

²⁹ cf. Toth, *supra* note 10, p. 1105; see also, (1993) vol. 30:2 *Common Market Law Review*, 241-245 at 243-4.

Gráinne de Búrca deals with another consequence of European integration, assessing the threat to integration posed by questions over the legitimacy of the Union: cf. “The quest for legitimacy in the European Union”, (1996) vol. 59:3 *Modern Law Review* 349-376.

ideologies of subsidiarity can inform us about the political environment in which its role in EC law was conceived, but the principle has not actually been implemented within the quasi-federal structure originally intended.

(i) The Single European Act

Although the word itself is not actually used, the first implicit application of subsidiarity in Community law is Article 130r(4) EEC, introduced by the Single European Act (SEA), which provides that “[t]he Community shall take action relating to the environment to the extent to which the objectives referred to in [this provision] can be attained better at Community level than at the level of the individual Member States....”³¹ Van Kersbergen and Verbeek argue that the adoption of the SEA “...augmented the until then latent anxiety of several actors that the process of completing the Common Market would inevitably lead to an incremental widening of the powers of the European Commission.”³² Consequently, subsidiarity, although advanced by the German *Länder* as a federal concept, was instead being promoted as a protective safeguard for national sovereignty. The notion that subsidiarity could mean all things to all people had become entrenched in Community relations. In particular, its inherent ambiguity and flexibility paved the way for a lowest common denominator settlement in the 1992 Programme negotiations. Ironically, in the specific context of environmental policy, the Member States were well aware that collective action was both necessary and more efficient. The primary concern raised was that the achievement of common standards could weaken already existing domestic environmental policies.³³ Thus, by limiting Community competence to those objectives ‘better attained’ by collective action, the Member States ensured that the implementation of more stringent national measures

³⁰ e.g. Cass, *supra* note 8, especially pp. 1110-1128.

³¹ This paragraph has not been retained in Article 130r EC, as amended by the TEU, although the phrase ‘[w]ithin their respective spheres of competence...’ (Article 130r(5) EEC/Article 130r(4) EC) does appear; it is generally assumed that the paragraph has been deleted because of the broader application of subsidiarity in the new Article 3b EC, discussed *infra*.

³² Van Kersbergen and Verbeek, *supra* note 15, p. 219.

was not precluded. This may have significant implications for Community language policy, since many Member States have already adopted and implemented minority language rights regimes.³⁴

Subsidiarity became something of a consolation principle in the SEA negotiations, a reassurance that Member State sovereignty was not being swallowed up by the process of European integration. Yet the application of subsidiarity was linked to environmental policy, an area where the benefits of collective action are patently obvious. This demonstrates the political rather than practical character of the principle in Community law from the outset. Furthermore, environmental policy is a politically sensitive issue, which merits different levels of priority in the various Member States. The association of subsidiarity with environmental policy thus established a potentially ominous precedent of retaining Member State control over controversial Community competences *after* the fact of their incorporation into the treaty framework. This is particularly evident in the context of the Treaty on European Union, discussed *infra*, since subsidiarity is especially relevant to new, politically sensitive policy areas, such as education and culture.

As regards the practical implementation of subsidiarity, Article 130r(4) introduced the 'better attainment test' *i.e.* justifying Community measures where objectives can be better attained by collective action. Emiliou points out that the application of this criterion is necessarily a subjective value judgment rather than an objective process.³⁵ Again, this emphasises the political and ideological character of subsidiarity in Community law. In addition to the 'better attained' test, the

³³ Denmark was particularly concerned about this issue.

³⁴ *cf.* Chapter 4 *infra*, on the application of subsidiarity to EC cultural policy; Appendix I, *re*: Member State constitutional provisions that deal with language policy. More generally, in the context of the Maastricht Treaty, Lane, *supra* note 4, raises the possibility that (p. 970) "...community action would be justified and lawful in some Member States who had showed themselves unable or disinclined to comply with acceptable standards of...protection, but not in others which had not." Lane questions the legitimacy of such a development, although Temple Lang suggests that since Community measures may take regional differences into account, this could be translated as taking Member State differences into account (John Temple Lang, "What powers should the European Community have?", (1995) vol. 1:1 *European Public Law*, 97-116 at 109.

association of the principle with environmental policy implies a strong presumption of a transnational or cross-boundary dimension before Community action can be justified. Steiner considers it surprising that this requirement was not spelled out explicitly in the provision itself.³⁶

(ii) The Treaty on European Union

The Conclusions of the European Council Summit at Edinburgh (1992) refer to subsidiarity as a "...basic principle of the European Union".³⁷ The Preamble to the Treaty on European Union (TEU) characterises the Union as "...[continuing] the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity...." This objective is reiterated in Article A TEU, while Article B provides that "[t]he objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3b of the [EC Treaty].

Article 3b EC, as amended by the TEU, is the key exponent of subsidiarity in Community law and provides as follows:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Article 3b deals with the respective competence of the *Community* and the Member States; it is unlikely that it applies in the Union context. Article B TEU was,

³⁵ Emiliou, *supra* note 26, p. 395.

³⁶ Jo Steiner, "Subsidiarity under the Maastricht Treaty", in David O'Keefe and Patrick Twomey (eds.), *Legal Issues of the Maastricht Treaty*, (London: Chancery, 1994), 49-64 at 52.

³⁷ European Council, *Conclusions of the Presidency*, (Edinburgh Summit, December 1992), (hereafter 'Edinburgh Conclusions'), Annex 1, Part A, Bull.EC 12-1992, p. 3.

therefore, probably intended as a statement of principle rather than one of practice.³⁸ Furthermore, Article L TEU provides that the jurisdiction of the Court of Justice does not extend to the Preamble or to Titles I, V and VI TEU. This means that the references to subsidiarity in the TEU are not subject to judicial interpretation, again supporting the conclusion that they are declarations of principle and not clear legal statements. Bernard remarks, however, that the legal significance of constitutional principles should not be underestimated, since they "...have the capacity to apply not only directly when the legislation explicitly so provides but also indirectly by incorporating themselves in the interpretation of other provisions."³⁹ To assess the political import of Articles A and B TEU, it is necessary to recall their ideological background. As noted earlier, ensuring that decisions be taken as closely as possible to the citizens was a particular concern of the German *Lander*; more generally, it is a means of ensuring accountability to the citizen in the decision-making process.⁴⁰ At the TEU negotiations, both Germany and Belgium sought even stronger guarantees to protect variances in national traditions, including a role for the Court of Justice in deciding any disputes on the allocation of powers.⁴¹ This demand was strongly opposed by Britain, on the grounds that the Member States alone had the right to sanction or refute Community intervention. Peterson refers to Article A as a "...much watered-down compromise..." to placate Germany and Belgium, by granting at least nominal recognition of their systems of sub-national government.⁴² In real terms, however, 'closer to the citizen' was taken to imply 'Member State' in the Union and

³⁸ Toth, *supra* note 10, pp. 1086-7, argues that Article B TEU, and therefore Article 3b EC, may be relevant to Common Foreign and Security Policy, where the Union has competence, but not to Justice and Home Affairs, where competence is exclusively intergovernmental. The *Common Market Law Review* (1993), *supra* note 29, points out that Article B TEU may have implications for the application of Article 3b EC to the ECSC and Euratom.

³⁹ Nicolas Bernard, "The future of European economic law in light of the principle of subsidiarity", (1996) vol. 33:4 *Common Market Law Review*, 633-666 at 634.

⁴⁰ cf. Kieran Bradley and Alastair Sutton, "European Union and the Rule of Law", in Andrew Duff, John Pinder and Roy Pryce (eds.), *Maastricht and Beyond: Building the New Europe*, (London: Routledge, 1994), 229-266 at 234-5.

⁴¹ John Peterson, "Subsidiarity: A definition to suit any vision?" (1994) vol. 47:1 *Parliamentary Affairs*, 116-132 at 120.

⁴² *ibid.*

Community contexts, in line with the ideology of state sovereignty, advanced in particular by Britain and Denmark. This interpretation is at variance with the intentions of those who proposed the codification of subsidiarity in the first place, yet had been anticipated and challenged by the *Common Market Law Review* in 1990:

In the discussions between Brussels and the capitals of the [Member States], the question is usually whether a given matter should be governed by Community or national legislation. It is always implicitly assumed in this respect that governmental rules and regulations are in fact necessary. However, this is by no means always clearly the case. It must first be asked whether a given matter cannot be left to the private sphere *i.e.* to the individual, the family, firms, trade unions, associations and co-operatives.⁴³

This archetype of subsidiarity has been drawn upon from time to time, particularly in relation to discussions on the European Social Charter.⁴⁴ A more widespread application of this interpretation would affect regional policy in particular, if regional or local authorities were allocated competence to achieve Union objectives where appropriate. The Committee of the Regions has called for "...an infranational model of the European Union, in which the role of subnational and transnational interest groups is as important as that of the nation states or of the supranational institutions."⁴⁵ The implementation of this recommendation would have obvious implications for regional language groups. But there is a concurrent centralisation tension within the Community that has predominated the sub-national aspect of the subsidiarity debate. Member States have expressed fears that their competence is being usurped by the centralising forces of European integration; they have sought, therefore, to reaffirm *their* law-making role as the entities 'closest' to their citizens.⁴⁶ Meanwhile, sub-national authorities are equally concerned about centralisation, but as much in terms of national authorities as in the context of European integration. A stronger provision on this aspect of subsidiarity could have tackled the grievances of

⁴³ *supra* note 9, p. 182.

⁴⁴ Steiner, *supra* note 36, p. 50, argues that the earliest manifestation of ensuring decisions be taken as closely to the citizen as possible is the fact that the Treaty of Rome allowed derogation from the four freedoms, based on public morality, policy, security and health.

⁴⁵ Report of the Committee of the Regions (1995), quoted in de Búrca, *supra* note 29, p. 368.

⁴⁶ Temple Lang, *supra* note 34, p. 104, points out that subsidiarity has also been raised in the context of larger/smaller Member States.

sub-national authorities but it is unlikely that Article A will suffice.⁴⁷ Moreover, the inappropriateness at present of any Community interference with sub-national administrative structures must be borne in mind.

Overall, it is unlikely that Article A TEU will have any considerable effect on ensuring that decisions 'close to the citizen' should be taken by sub-national authorities, as advocated by federal ideology. Instead, the phrase has, rightly or wrongly, become equated with the competence concerns of the Member States. This was recognised by the European Council at the Edinburgh Summit in unambiguous terms: "[subsidiarity] contributes to the respect for the national identities of Member States and safeguards their powers."⁴⁸

3. ARTICLE 3b EC

A. Ideological Background

Article 3b reflects a deliberately intended bias towards the supremacy of Member State decision-making where there is any uncertainty over EC/Member State competence. But its wording is open to interpretation. The fact that specific criteria are outlined, such as 'scale or effects', implies that the Community must justify any intended action in an area where it does not have exclusive competence. In turn, this creates a presumption that Member State competence should be assumed in the first instance. But despite these underlying ideological intentions, it is argued *infra* that Article 3b(2) may in fact *require* as well as permit Community intervention where certain criteria are met. Schilling thus refers to subsidiarity as a double-edged sword,

⁴⁷ Brittan, *supra* note 3, for example, regards the establishment of the Committee of the Regions (Articles 198a-198c EC) as a 'welcome escape from *national* centralisation' (p. 574).

⁴⁸ Edinburgh Conclusions, *supra* note 37, p. 1.

In the specific context of minority languages, Temple summarises that "[a]lthough subsidiarity taken to its logical conclusion might have helped some regional languages, the interpretation favoured by the British Government (that is, the 'devolution' of power to Member State governments) and which is no doubt supported by...other...governments, could have serious consequences for the languages spoken in states...where the government is not particularly sympathetic to their lot." (Rosalind M. Temple, "Great expectations? Hopes and fears about the implications of political developments in Western

which has the capacity to "... prevent the higher *and* lower level from taking any action in areas properly falling within each other's respective sphere of action."⁴⁹ These ambiguities reinforce the perception of subsidiarity as an ideologically interchangeable concept, with both centralising and decentralising potential. Emiliou refers to both 'subsidiarity from above', meaning benefits for central institutions, and the 'bottom-up approach', where central institutions are subsidiary to lower levels of authority.⁵⁰

These divergent perceptions of subsidiarity are even more apparent when legal and political interpretations of the principle are contrasted. Essentially, politicians have steadfastly promoted subsidiarity as a legal norm, while lawyers have been far less convinced of its capacity as such. In the political context, subsidiarity has been associated with Article F(1) TEU, as an additional safeguard for national identity.⁵¹ The difficulty with this approach is that it contradicts the very ethos of Community intervention, which strives to transcend national boundaries. Obviously, collective action should be undertaken taken only where warranted; subsidiarity has a clearly feasible role in this context. But any artificial or regressive manipulation of concepts, whether rules or principles, can only serve to weaken their effect, especially where such orchestration is based primarily on an attempt to evade the legitimate effects of Community law.⁵² As Lasok has warned, "...subsidiarity ...cannot be interpreted as a signal to claw back those elements of the national sovereignty which already have been or will be in the future given up in accordance with the Treaties."⁵³

Europe for the future of France's regional languages", in M.M. Parry, W.V. Davies and R.A.M. Temple, *The Changing Voice of Europe*, (Cardiff: University of Wales Press, 1994), 191-211 at 204.

⁴⁹ Schilling, *supra* note 1, p. 205 (emphasis added).

⁵⁰ Emiliou, *supra* note 26, p. 384.

⁵¹ *cf.* Dashwood, *supra* note 1, p. 113 (footnote 1).

⁵² Note, for example, the tone of this extract from *The Economist*, (11 July 1992): "[t]he true worth of the principle [of subsidiarity] will be known only once some busybody Directive has been challenged in the European Court and the judges have ruled on where Brussels stops and nations are to be left alone." (quoted in Emiliou, "Subsidiarity: Panacea or fig leaf?" in O'Keefe and Twomey (eds.), *supra* note 36, 65-83 at 77.)

B. Article 3b(1): The Attribution of Powers⁵⁴

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

Article 3b(1) EC expresses one version of a circular argument. Alternatively, it could be stated that if an objective has been assigned to the Community, it must have the requisite power to achieve it. Thus, 'power' refers to a treaty-based sanction for Community action. In practice, however, the attribution of powers is somewhat more complicated. This can be ascribed to the nature of Community law generally and to the diversity of substance in the treaty provisions, which are not drafted in as precise a manner as those of, for example, federal constitutions.

Articles 3 and 3a EC set out lists of Community activities but these provisions are not themselves legal bases for Community action; legal basis is ascertained from subsequent, more detailed treaty provisions. Toth sets out the following general principles for determining the nature of Community powers:

[T]he Treaty follows a system which is a purpose-oriented or purpose-bound one: the Community's competences are linked to its tasks and objectives. In conferring and exercising competences, the decisive consideration is: is a power necessary to perform a task to achieve an objective for which the Community is responsible? If the answer is "yes", the Community is deemed to have that power.⁵⁵

In practical terms, the Community institutions are required to assess draft legislative measures against the limits of Community powers: "[t]he examination...should establish the objective to be achieved and whether it can be justified in relation to an objective of the Treaty and that the necessary legal basis for its adoption exists."⁵⁶ In accordance with Article 190 EC, measures adopted must set out "...the reasons on

⁵³ Dominik Lasok, "Subsidiarity and the occupied field", (1992) 142 *New Law Journal*, 1228-1230 at 1229, referring to Case 24/83 *Gewiese v. Mackenzie* [1984] ECR 817.

⁵⁴ The division of powers along exclusive and concurrent competence is discussed in Section C *infra*.

⁵⁵ Toth, *supra* note 10, p. 1082.

⁵⁶ Edinburgh Conclusions, *supra* note 37, p. 6.

which they are based.” The Court of Justice has the power to annul a measure where an inadequate explanation of its legal basis has been given.

Two further Treaty provisions are relevant to the attribution of Community powers.

Article 5 EC provides that:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Thus, Member States have a significant role to play in the implementation of Community law. Basic duties that have been grounded in Article 5 include the obligation on Member States to give full effect to Community law, to implement Community objectives, to co-operate with Community institutions to this end and to co-operate with the other Member States.⁵⁷ The European Council has declared that Member State duties under Article 5 EC cannot be called into question by the principle of subsidiarity.⁵⁸ This means that even where Community action is precluded by Article 3b(2), the Member States themselves are still required to fulfil the Treaty obligation in question. The role of the Member States in the enforcement of Community objectives relies particularly on the capacity of national courts to administer Community law. Curtin has identified two principal advantages pertaining to this devolution of authority to the Member States: first, it ensures accessible remedies to individual citizens and second, “...it removes the possibility of non-compliance since a state cannot defy its own courts.”⁵⁹

⁵⁷ cf. John Temple Lang, “Community constitutional law: Article 5 EEC Treaty”, (1990) vol. 27:4 *Common Market Law Review* 645-681.

⁵⁸ Edinburgh Conclusions, *supra* note 37, p. 4; cf. also Bernard, *supra* note 39, p. 652.

⁵⁹ Deirdre Curtin, “The constitutional structure of the Union: A Europe of bits and pieces”, (1993) vol. 30:1 *Common Market Law Review*, 17-69 at 31.

Temple Lang, referring to Case 71/76 *Thieffry v. Conseil de l'ordre des avocats à la cour de Paris*, [1977] ECR 765, points out that, in accordance with Article 5, Member States are bound to contribute to the achievement of Treaty objectives even where Community law has made no special provision thereafter (p. 657).

Article 235 EC provides that:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Article 235 refers only to powers required specifically for the achievement of the common market. Moreover, it addresses the need to sanction additional Community competence, while subsidiarity is concerned with the allocation of power to act where competence *already* exists. The provision does, however, highlight the procedures for the attribution of competence within the EC structure. Essentially, the Member States retain the power of Treaty amendment and, in this way, govern the direction of Community policy. In that context, the fears of certain Member States that the Community, or perhaps more specifically, the Commission, has taken on a policy-making life of its own seem unfounded. In practice, however, it is clear that Community policies have often been developed on ambiguous legal bases, legitimised by Treaty amendments 'after the fact'. Consequently, the initial impetus of co-operation has been somewhat eroded and a feeling of competitiveness between the Member States and their own dynamic creation has surfaced. Indeed, this tension was primarily responsible for the inclusion of subsidiarity in the EC Treaty in the first place.

C. Article 3b(2): The Principle of Subsidiarity and the Division of Competence

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

This phrase generates an assumption that Community powers are distinguishable as being either exclusive or non-exclusive/concurrent. But an explicit distinction to this effect is not set out in *any* provision of the EC Treaty. The resulting debate on the exact nature of Community competence is both persistent and conflicting.

As noted earlier, the principle of subsidiarity is usually associated with allocating competence in a federal system, where the division of powers is clearly outlined in a written constitution. The desirability of adopting the federal system in the Community context has been called into question since its rigidity might "...tie the hands of the Community unduly."⁶⁰ In the context of the original EEC Treaty, Toth argues that "[t]he Treaty uses an entirely different method and terminology by either imposing obligations on Member States directly or authorising the Council and the Commission...to 'make regulations', 'issue directives' or 'take decisions' (*i.e.* legally binding measures)."⁶¹ On this basis, he argues that subsidiarity cannot apply to any Community competences granted by the EEC Treaty, which must, therefore, be considered as exclusive:

During the whole time of their existence, the Communities have operated on the basis that all the powers needed to carry out their tasks have been vested in the institutions, while strictly defined implementing/management powers could be delegated to the Member States. The principle of subsidiarity turns this logic upside down. It creates a presumption that all powers other than exclusive competences (which are nowhere defined) remain vested in the Member States while the Community can exercise these powers only in certain limited situations....This effectively relegates the Community to a 'subsidiary' (*i.e.* subordinate) role, as is evident in the term itself.⁶²

Toth points instead to Article 130r(4) EEC, introduced by the SEA, as an example of a clear and intended application of the principle of subsidiarity; its wording, noted *supra*, is not comparable to any provision of the original Treaty.⁶³ He also reasons that some of the new policy areas introduced by the TEU⁶⁴ may be subject to the

⁶⁰ Temple Lang, *supra* note 34, p. 103; Peterson, *supra* note 41, p. 127, notes that in the more traditional federal structures, such as Germany and the United States, "[t]he balance of power between the states and the centre...has never been static, predetermined or uncontroversial...[B]oth countries have been marked by far more concerns about the proper division of powers between the states and the centre than exists in Europe today...."

⁶¹ Toth, *supra* note 10, p. 1081.

⁶² *ibid.* p. 1103.

⁶³ *ibid.*, p. 1092.

⁶⁴ *i.e.* education (Article 126 EC), vocational training (Article 127 EC), culture (Article 128 EC), public health (Article 129 EC), consumer protection (Article 129a EC), trans-European networks

application of subsidiarity, discussed further *infra*, given the detailed limitations on the Community's capacity to act explicitly set out in each relevant provision. Schilling, on the other hand, disputes these conclusions.⁶⁵ His principal objection is that this construction of exclusive competence would render Article 3b(2) virtually meaningless. It is submitted, however, that Schilling's reasoning is in direct contradiction with the wording of that provision itself - '[i]n areas which do *not* fall within its exclusive competence' - which expressly acknowledges both the existence of exclusive competence as well as the non-applicability of subsidiarity in that domain. Subsidiarity neither extends nor restricts *competence*; rather, it determines the distribution of functions. In reality, the primary concern has been to actually define exclusive/concurrent competences so that the appropriate actor can be determined either independently (exclusive competence) or by means of (concurrent competence) the tests outlined in Article 3b(2). A related issue is the sphere of exclusive Member State competence *i.e.* where matters are strictly internal and have not been brought within Community competence, or where competence for implementing a Community objective has been allocated expressly and exclusively to the Member States. In this context, there are fears that the Community is systematically eroding internal policy fields, coupled with hopes that subsidiarity will somehow defend and preserve the realm of national competence.⁶⁶

There is general agreement that core policy areas of EC law generate exclusive Community competence, where the Member States have no power to act *i.e.* common commercial policy, competition law as it relates to inter-state trade, the common organisation of agricultural markets, transport policy and the conservation of marine biological resources.⁶⁷ Temple Lang has also included treaties on the

(Articles 129b-d EC), industry (Article 130 EC), economic and social cohesion (Articles 130a-e EC), and research and technological development (Article 130f-p EC).

⁶⁵ Schilling, *supra* note 1, p. 219.

⁶⁶ Schilling, *supra* note 1, has referred to subsidiarity as "...an additional exit possibility..." (p. 232).

⁶⁷ *cf.* paper from the Commission to the Council and European Parliament (October 1992), Bull.EC 10-1992, p. 120; Bernard, *supra* note 39, pp. 655-660.

supply of nuclear materials and certain mergers.⁶⁸ The basic justification for attributing exclusive competence in all of these areas is that centralised responsibility for collective action is essential for the implementation of common laws and standards. Although not defined in the Treaty as such, the exclusive character of Community competence is generally determined by the wording of the relevant provisions and, more precisely, by the type of legal measures which the Community institutions may adopt, where specified. This is somewhat narrower than Toth's interpretation that *all* Community competences outlined in the EEC Treaty are automatically exclusive.

The doctrine of exhaustiveness is also relevant to the determination of exclusive competence. It is a distinct concept but the effects of both principles are similar from the Member State perspective. Exhaustiveness means that even where treaty provisions have not implied exclusive Community competence, the Community legislation actually enacted leaves no room for any further regulation, by either the Member States *or* the Community.⁶⁹ Exhaustiveness is not, therefore, concerned with which level of authority *may* act: rather, it relates to the fact that, in practical terms, neither level *can* act. Schilling argues that in the case of exhaustiveness, subsidiarity can apply, since it is not exclusive competence in the 'technical sense'.⁷⁰ But it is difficult to understand the logic of this conclusion, since there can be no further action to which the principle could be applied.

The phrase 'concurrent competence' is misleading as it implies that, in certain policy areas, the Community and the Member States are free to act simultaneously and with equal authority. Once again, this scenario is not set out in any treaty provisions. One view is that concurrent powers are those powers conferred on the Community which it has not yet exercised, thus creating a temporary or interim Member State

⁶⁸ Temple Lang, *supra* note 34, p. 98.

⁶⁹ *cf.* Case 237/82 *Jongeneel Kaas*, [1984] ECR 483 at 515-517, paras. 12-16 (opinion of the Advocate General).

⁷⁰ Schilling, *supra* note 1, p. 223 *et seq.*

competence. Once the Community acts, Member States lose their competence to act, leading to the gradual expansion of exclusive Community competence.⁷¹ This is called the doctrine of preemption or the principle of the occupied field. It is based on the logic that if Member States could act unilaterally, this would derogate from the primary objective of achieving a single market. Also relevant is the principle of *effet utile*, based on Article 5 EC, which prevents Member States from adopting national measures that interfere with the operation of Community law, preventing it from having 'full effect' after it has been adopted.

But these interpretations are far from resolved. Temple Lang contends that "...apart from a few cases where Community measures are intended to be exhaustive, Community powers are still almost all concurrent."⁷² He further argues that Community legislation in these areas does not deprive the Member States of competence on the same subject matter. Where this construction leads to the enactment of conflicting measures, it can be regulated by the doctrine of the supremacy of EC law. Emiliou proposes a similar interpretation, arguing that Member States may legislate in areas of concurrent competence where Community powers exist but have not been exercised, or have been exercised in an incomplete manner.⁷³ Member State legislation must, however, be guided by the underlying Community interest. Again, if the Community does eventually legislate in the area, conflicting national laws will be displaced in accordance with the primacy of EC law. Toth specifies that Member States are not really acting unilaterally in these circumstances but are instead "...‘trustees of the common interest’ under Community supervision."⁷⁴ Steiner is critical, however, of the idea that the Community has 'potential' competence; she argues that this would "...allow whole areas of activity to escape scrutiny under [Article 3b(2)] simply because the Community has potential

⁷¹ cf. Case 20/70 *Commission v. Council* [1971] ECR 263 at 275.

⁷² Temple Lang, *supra* note 34, p. 99.

⁷³ Emiliou, *supra* note 26, p. 68.

⁷⁴ Toth, *supra* note 10, p. 1084.

competence in these areas...[undermining] the very purpose for which this provision was intended.”⁷⁵ It is submitted, however, that this argument is fundamentally flawed. Subsidiarity does not come into play until legislative *action* is at issue. Its purpose is to determine which level of authority should undertake the implementation of an established Community objective. Its function is thus entirely different from any assessment of potential policy areas in the abstract.

Closely related to the principle of subsidiarity in its dynamic context is the idea of co-operative federalism, a system where the attribution of powers is not “...confined to mutually exclusive watertight compartments.”⁷⁶ This is perhaps the broadest interpretation of competence division, where powers are determined informally on a loosely based idea of consensual concurrent action; it contrasts sharply with the treaty-based attribution of powers practised within the Community context at present.

Prior to the adoption of the Maastricht Treaty, an Interim Report on behalf of the Committee for Institutional Affairs noted that “...clarity with regard to the division of competences...of the Union [is] dependent on subsidiarity.”⁷⁷ It would be more correct, however, to say that the application of subsidiarity is dependent on clarity in respect of competence division. And yet there exists considerable disagreement over this fundamental point of Community law. The confusion has been exacerbated by the fact that the Treaty does not give explicit guidance. In this situation, there exists a real danger that subsidiarity could amount to nothing more than a counter-productive quandary within competence delimitation. There is some support for the idea that ‘concurrent Community competence’ refers to certain new competences introduced by the SEA and TEU that also require some level of Member State action. Dashwood

⁷⁵ Steiner, *supra* note 36, p. 58.

⁷⁶ José Palacio González, “The principle of subsidiarity (A guide for lawyers with a particular Community orientation)”, (1995) 20 *European Law Review*, 355-370 at 358.

⁷⁷ PE Doc. A3-163/90, 22 June 1990, para. 6.

seems to be arguing, like many of the commentators already mentioned, that most Community powers are concurrent in this sense:

In most policy areas, there is a subtle interplay between the powers of the Community and those of the Member States. National powers remain intact, except that, under the principle of the primacy of Community law, they must not be used in ways that conflict with existing measures validly adopted under the Treaty. For instance, there is an abundance of national legislation co-existing with Community legislation on the protection of the environment; and, indeed, the Treaty expressly preserves the Member States' right to apply more stringent environmental standards.⁷⁸

Yet he does not address the qualification actually set out in this extract: in the case of environmental law, the Treaty provides *expressly* for concurrent Member State competence in Article 130r(4) EEC. In fact, the subsequent paragraph, Article 130r(5), begins with the phrase "[i]n their respective spheres of competence...." These paragraphs were the first Treaty provisions to stipulate a concurrent competence for Member States. Similar, and indeed more stringent, limitations can be found in a number of the provisions imported by the TEU that outline new Community competences, including Article 128 EC (cultural policy). Dashwood has attempted to illustrate a rule by using a clear exception. But the enforcement and implementation of Community law, tasks generally assumed by Member States, have been confused with legislative competence; this idea is discussed further *infra* in the context of the principle of proportionality.

The view that *all* Treaty competences are exclusive to the Community is, however, equally untenable. The restrictive wording of the new TEU competences, for example, could hardly be interpreted as precluding Member State competence once the Community decided to act. In some of these provisions, the harmonisation of laws has been specifically prohibited *e.g.* Article 128 EC, discussed in Chapter 4 *infra*. This further supports the view that the treaty provisions will indicate where concurrent competence has been intended; subsidiarity applies to action undertaken in connection with these policy areas only. In this regard, Weatherill has called for a more flexible reformulation of the classic doctrine of preemption: "[i]n casting aside

⁷⁸ Dashwood, *supra* note 1, p. 117.

total harmonisation as a model which cannot reflect the diversity of interests in the modern Community, one is welcoming flexibility and innovation and enshrining greater sensitivity to national preferences.”⁷⁹ Whatever the merits of this proposal, such developments could only be realised within a revised treaty framework, as has occurred with both the SEA and TEU, rather than by an artificially manipulated and indiscriminate application of the principle of subsidiarity.

D. Article 3b(3): The Principle of Proportionality

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

The principal concern here is to distinguish subsidiarity, which relates to the *allocation* of powers, from the principle of proportionality, which concerns the *exercise* of powers by the institutions. Proportionality applies across the entire range of Community powers and is not confined, like subsidiarity, to concurrent competence only. It is an established, objective assessment of whether measures enacted are lawful or excessive, in accordance with other Treaty provisions or principles.⁸⁰ Subsidiarity, on the other hand, is a subjective judgment, in terms of appropriateness and relative efficiency, on which level of authority should take the action in the first place. Furthermore, proportionality is largely operative in the sphere of Community/citizen relations, while subsidiarity pertains inherently to relations between the Member States and the EC.

The European Council published guidelines, at the Edinburgh Summit, for the application of proportionality in practice.⁸¹ It was stressed that burdens, whether financial or administrative, associated with the implementation of Community law

⁷⁹ Stephen Weatherill, “Beyond preemption? Shared competence and constitutional change in the European Community”, in O’Keefe and Twomey (eds.), *supra* note 36, 13-33 at 22.

⁸⁰ *cf.* Case 15/83, *Denkavit*, [1984] ECR 2171, at 2175: “[b]y virtue of the principle of proportionality, according to well established case law of the Court, measures adopted by Community institutions must not exceed what is appropriate and necessary to attain the objective pursued.”

⁸¹ Edinburgh Conclusions, *supra*. note 37, pp. 8-10.

should be minimised, and must be proportionate to the objective to be achieved. In particular, it was urged that Community measures should "...leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty."⁸² This means that EC measures should, where possible, leave discretion to the Member States by setting out alternative ways in which the objectives can be achieved. Where Community law requires common policies, minimum standards should be outlined but Member States should have the freedom to adopt stricter national standards if they wish. The Council advocated the use of directives over regulations, framework directives instead of detailed measures, and non-binding measures, *i.e.* recommendations, where appropriate. The role of the Community was characterised in terms of 'encouragement and 'co-ordination', 'complementing', 'supplementing' and 'supporting'.⁸³

These guidelines demonstrate the fine line between proportionality and subsidiarity. Toth goes so far as to state that the Council and Commission tend to confuse the two principles.⁸⁴ The distinction can be further explained by examining subsidiarity in the specific context of directives. Article 189 EC provides that "[a] directive shall be binding, as to the result to be achieved, but shall leave to national authorities the choice of form and methods." In an explanatory statement on the Report of the Committee for Institutional Affairs, the rapporteur observed that the principle of subsidiarity was already reflected in practice by the Community's preference for legislating in the form of directives.⁸⁵ But directives assign discretion to the Member States only within the margins of selecting the method of implementation for a Community objective; the *decision* to implement that objective has already been mandated at EC level. Thus, actual legal competence remains with the Community institutions. The Treaty allocates competence; where competence has been allocated

⁸² *ibid.*, p. 8.

⁸³ *ibid.*, p. 9.

⁸⁴ A.G. Toth, "A legal analysis of subsidiarity", in O'Keefe and Twomey (eds.), *supra* note 36, 37-48 at 38.

⁸⁵ Extracts reproduced in Cass, *supra* note 8, p. 1124.

to both the EC and the Member States, subsidiarity comes into play to establish which level of authority should exercise its competence for any given situation. Emiliou argues, however, that “[e]xperience has...shown that this view is too simplistic. Subsidiarity should also determine instruments through which Community powers will be exercised.”⁸⁶ But he fails to elaborate on the nature or substance of this ‘experience’. It is far more logical that relevant Treaty provisions, as well as the nature of the task at hand, should be the determining guide when deciding which form of legal measure to adopt in particular circumstances, rather than resorting to the intrinsic politics of subsidiarity.

E. The Application of Subsidiarity in Practice

Subsidiarity is usually classified as a general principle of Community law, an interpretation that is strengthened by its location in the Treaty alongside the established principles of attribution of powers and proportionality. The implications of this classification are considered *infra*, as is the ambiguity over its justiciability.

(i) Tests for the Allocation of Competence to the Community

Article 3b(2) provides that for any policy area, apart from areas of exclusive competence, Community action is justifiable where “...the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.” Everling notes that the original draft of Article 3b(2) was similar in wording to the ‘better attained’ principle in Article 130r(4) EEC, but that “...because this is always a valid assertion, as every problem has some connection with any other, this clause would have had a centralising effect.”⁸⁷ He describes the adopted wording as a compromise, which incorporates the additional criterion that the objective cannot be sufficiently achieved at Member State level.

⁸⁶ Emiliou, *supra* note 26, p. 404.

⁸⁷ Everling *supra* note 4, p. 1070.

It has been argued that the wording of the paragraph ('...therefore...by reason of...') indicates that the 'sufficiently achieved' and 'scale or effects' criteria are cumulative.⁸⁸ This means that whether or not Community action is required by reason of necessity must be established by first judging whether the objective can or cannot be sufficiently achieved by the Member States. If it cannot, then the 'scale or effects' test comes into play. The 'better attainment' test in Article 130r(4) EEC has been criticised for constituting a subjective judgment;⁸⁹ in that context, it is difficult to see how the phrase 'sufficiently achieved' can make any difference. In the current political climate, the priorities of Member States and of the Community are often perceived as competing interests. Conflicting views on whether stated objectives can be 'sufficiently achieved' at one level of authority or the other are thus inevitable, and far from objective. The application of the 'sufficiently achieved' test in the specific context of language policy under Article 128 EC is addressed in Chapter 4 *infra*.

The phrase 'scale or effects' is usually taken to imply that an objective must have a cross-border or transnational dimension before Community action can be justified. But even then, it cannot be assumed that EC legislation is *automatically* warranted.⁹⁰ It must first be shown that Member State action cannot 'sufficiently achieve' the proposed objective. It is important to note that the phrase does not read '*has not sufficiently achieved*'. The fact that Member States have not already attained the objective in question could not, therefore, be used to justify Community intervention, so that potential as well as proven capacity can determine the necessity test from the Member State perspective. Thus, even where an objective has a transnational dimension, the tests outlined in Article 3b(2) produce a bias in favour of Member State action. Emiliou supports this, surmising that "...when the effects of action at the

⁸⁸ Virginia Harrison, "Subsidiarity in Article 3b of the EC Treaty: Gobbledegook or justiciable principle?", (1996) vol. 45:2 *International and Comparative Law Quarterly*, 431-439 at 433.

⁸⁹ *cf.*, for example, Emiliou, *supra* note 26, p. 395.

⁹⁰ Bernard, *supra* note 39, p. 653, argues that the cross-border effect criterion could "...conceivably permit a challenge to the very objective of Community action."

national level are clearly more advantageous for the Member States or action at the Union level is more advantageous for the Member States than the task in question should not be given a dimension which extends beyond national frontiers.”⁹¹ There are fundamental difficulties, however, with this interpretation. As noted earlier, the assumption that ‘closer to the citizen’ is analogous to the Member States can have negative repercussions since the interests of national governments can often differ enormously from the needs of minority and other sub-national groups; steering attention away from the cross-border dimension of these concerns could actually preclude necessary Community intervention, on the basis of a restrictive application of Article 3b(2). Thus, it would be a mistake to analyse the ‘scale or effects’ tests in terms such as those used by Emiliou (‘given a dimension’); certain issues *have* a transnational dimension and must be addressed from this perspective so that appropriate and effective measures can be introduced and implemented. This echoes arguments made in Chapter 1 *supra*, where it was stressed that only centralised policy can redress the impact on language use patterns caused by centralisation itself.

The two strands of the Article 3b(2) test are, therefore, somewhat problematic on an individual basis. This suggests that their cumulative effect will not always produce a logical result, as submitted by Toth.⁹² Using the example of the purity of bathing waters in various Member States, he shows that there can be different answers to both the ‘sufficiently achieved’ and ‘scale or effects’ tests when dealing with the same issue. In the example he has selected, (*i.e.* the purity of bathing water at some Scottish beaches), Toth shows that Community action is justifiable in terms of effectiveness and enforcement, but that the scale of the problem in the broader European context is negligible, which would recommend Member State action. He questions the legitimacy of this contradictory result, asking if “...the principle of subsidiarity [can] be applied when the conditions laid down for its application are fulfilled in one or some Member States, or only when they are fulfilled in all?”⁹³ It

⁹¹ Emiliou, *supra* note 26, p. 393.

⁹² Toth, *supra* note 10, pp. 1097-8.

⁹³ *ibid.* at 1098.

was clear from the outset, therefore, that the actual implementation of the tests in Article 3b(2) required additional consideration. At the official level, comprehensive guidelines were issued by the European Council at the Edinburgh Summit (December 1992), in an attempt to redress the deficit ensuing from the ambiguous drafting of Article 3b. The issues raised therein are considered in detail in Chapter 4 *infra*, in the context of Article 128 EC.

(ii) Is Subsidiarity Justiciable? ⁹⁴

As noted earlier, the location of Article 3b EC in Part I of the Treaty, alongside the principles of proportionality and attribution of powers as well as Article 5, indicates that subsidiarity is itself a fundamental principle of Community law. If subsidiarity is justiciable, then the Court has jurisdiction to strike down a measure of Community law on the grounds that the measure has infringed Article 3b(2). The European Council guidelines state quite clearly that “...interpretation of the principle, as well as review of compliance with it by the Community institutions are subject to control by the Court of Justice, as far as matters falling within the [EC Treaty] are concerned.”⁹⁵

The principal objection to the justiciability of subsidiarity is that it would necessarily involve the Court in political assessments, a function more correctly left to the other Community institutions. Deciding whether or not Member States can ‘sufficiently achieve’ a Community objective is an inherently ambiguous concept, which cannot be decided entirely on empirical evidence. It is inevitable that competing interests and values will be raised and debated. Concern has been expressed that decisions based on political considerations rather than clear facts would damage the credibility of the Court’s authority in other policy areas. The House of Lords Select Committee on the European Communities observed, in a 1990 Report, that subsidiarity should

⁹⁴ Under Article L TEU, the Court does *not* have jurisdiction over the Preamble, Article A or Article B TEU, rendering these provisions non-justiciable. Constantinesco, *supra* note 6, p. 46, notes that the issue of justiciability had also been raised regarding Article 12 of the Draft Treaty on European Union.

⁹⁵ Edinburgh Conclusions, *supra* note 37, p. 4; the European Parliament has noted that “[j]udicial guarantees must be given with regard to respect for the principle of subsidiarity.” (Resolution on the Principle of Subsidiarity, 12 July 1990 [1990] OJ C-231/163)

influence those who take political decisions, but could not have a role in Court procedures:

[S]ubsidiarity [cannot] be used as a precise measure against which to judge legislation. The test of subsidiarity can never be wholly objective or consistent over time - different people regard collective action as more effective than individual action in different circumstances...[T]o leave legislation open to annulment or revision by the European Court on such subjective grounds would lead to immense confusion and uncertainty in Community law...The principle [should] be kept clearly in the minds of those who formulate Community legislation. But this should not be done so as to open the way to pointless litigation after the Council or the Commission have acted.⁹⁶

Bernard notes that denying the justiciability of Article 3b(2) EC "...should appease those who fear that the Court might become embroiled in political controversies surrounding the application of subsidiarity, but it also means that subsidiarity on its own cannot act as a bulwark to protect local values from interference by the Community."⁹⁷ Conversely, as is the case for some minority languages, accepting the justiciability of subsidiarity as it is currently interpreted could actually *prevent* the protection of local values by the Community, since 'closer to the citizen' has been inherently equated with 'Member State'.

Some commentators have sought a more adaptable approach, in order to circumvent the traditional constraints placed on the Court. Steiner argues that the Court is "...immune from political pressures...[I]t is accustomed to applying general principles of law which are often political in nature."⁹⁸ This implies that the credibility of the Court is being underestimated. In particular, it is arguable that the political neuroses of the Member States with regard to subsidiarity have been

⁹⁶ House of Lords Select Committee on the European Communities, *Report on Economic & Monetary and Political Union*, Session 1989-90, 27th Report (London: HMSO, 1990), p. 55.

⁹⁷ Bernard, *supra* note 39, p. 654.

⁹⁸ Steiner, *supra* note 36, p. 62.

In the context of international agreements, Opinion 1/94 of the Court of Justice has been used as an illustration of the Court's "...readiness to weigh up [the] issues with an appreciation of the political realities...." (Harrison, *supra* note 88, p. 438); see also Emiliou, "The death of exclusive competence?", (1996) vol. 21:4 *European Law Review* 294-311; N. Reich, "The 'November Revolution' of the Court of Justice: *Keck*, *Meng* and *Audi* revisited", (1994) 31 *Common Market Law Review* 459-471.

attributed, erroneously, to the Court. Moreover, the fact that the Court "...is not always comfortable for the Member States..." should be borne in mind.⁹⁹ To overcome the political motivations associated with the judicial review of subsidiarity, Lasok identifies the challenges for the Court of Justice as follows:

It is erroneous to think that the Court's function is to protect the rights of Member States or of the Community. It exists to see that in interpretation and application of the Treaties the law is observed. Thus it must be neutral and even-handed. Hitherto the Court has been acting as an instrument of integration, albeit within the parameters of the Treaties, and there is no reason to suppose that, after Maastricht, [it] will degenerate into a servant of either centralism or state power.¹⁰⁰

While it is essential that the reputation of the Court is not sacrificed at the altar of politicisation, it is equally important that subsidiarity is not applied erratically by the other institutions, unchecked by the Court of Justice. It has been suggested that the Court should confine itself to assessing Community measures in terms of 'manifest error' or 'misuse of powers', in other words, a restricted form of judicial review.¹⁰¹ In the context of Article 3b(2), this means assessing the basic question of whether an issue falls within exclusive Community competence or not.

In general terms, Toth identifies three conditions for the attribution of justiciability to a principle of Community law: first, the Court must have jurisdiction to deal with the issue; second, there must be a form of action whereby the issue can be brought before the Court (*i.e.* admissibility); finally, the Court must have the requisite power to determine the substance of the issue.¹⁰² In accordance with its status as a general principle of EC law, the Court is deemed to have jurisdiction over the principle of subsidiarity as outlined in Article 3b(2) EC. This jurisdiction relates only to matters connected with the application and interpretation of the EC Treaty. As regards admissibility, the European Parliament had sought the insertion of a new Article 172a EC, which would have enabled the institutions as well as the Member States

⁹⁹ Brittan, *supra* note 1, p. 569.

¹⁰⁰ Lasok, *supra* note 53, p. 1229.

¹⁰¹ Toth, *supra* note 10, p. 1102.

“...after the definitive adoption of an act and before its entry into force, to request the Court to verify...whether this act does not exceed the limits of the powers of the Community.”¹⁰³ This proposal for *a priori* judicial review was not, however, adopted.

Subsidiarity could be referred to in two existing procedures for judicial review *i.e.* direct actions initiated in the Court and rulings on Article 177 EC referrals. A direct action based on Article 173 EC involves the annulment of a Community measure, usually one adopted by the Council, on the grounds that the measure exceeds the Community’s powers.¹⁰⁴ It is especially likely that this action would be taken by a Member State outvoted in the Council on a qualified majority voting issue. Other possibilities include an action for damages under Articles 178 and 215(2) EC, which are discussed *infra* in the context of retroactivity. An action may also be taken against a Member State by the Commission (Article 169 EC) or by another Member State (Article 170 EC), where the Court reviews national legislation in subject areas that come within exclusive Community competence. A matter of some controversy is whether legal consequences can be incurred where the Council has decided, in accordance with the principle of subsidiarity, that an issue should be dealt with by Member State action. It is not clear whether the Member States are then legally obliged to implement the Community objective under Article 5 EC. Weatherill has asserted that the wider the Community competence, the more definite the impact of Article 5 on Member State responsibility to take action.¹⁰⁵ In contrast to the political climate surrounding the introduction of Article 3b, this philosophy presumes shared values and objectives. But can failure by the Member States to fulfil their obligations in these circumstances generate *legal* consequences under Articles 169 or 170 EC? Palacio González disputes this, arguing that while Member States are free to act

¹⁰² Toth, “Is subsidiarity justiciable?”, (1994) 19 *European Law Review* 268-285.

¹⁰³ *ibid.*, p. 273.

¹⁰⁴ *cf.* Toth, *ibid.*, pp. 274-5, on why acts of the Commission or Parliament are not generally subjected to Article 173 EC actions.

¹⁰⁵ Weatherill, *supra* note 79, p. 31.

where the Community has not exercised its competence, it is untenable that obligations should arise from Member State failure to act.¹⁰⁶ But this interpretation creates an unacceptable prejudice in favour of Member States, who appear free to disregard accepted Community objectives after the fact of their formal inclusion in the EC Treaty. Harrison does point out that since there can be no obligation on the Community itself to act even where subsidiarity would justify action, then, conversely, there can be no consequences for Member States in the same situation.¹⁰⁷ Bernard, however, emphasises that “[a]t no point does Article 3b contemplate that proposed action might not be met at all.”¹⁰⁸ This implies that the onus to act, if removed from the Community, must surely be transferred to the Member States, but Bernard rejects this conjecture, stating that it cannot be considered a legally enforceable duty under Article 3b since that provision applies only to Community and not to Member State action. His interpretation is open to challenge, however, on the grounds that Article 3b(2) specifically calls Member State capacity into question by virtue of the ‘sufficiently achieved’ test. Furthermore, even without legal consequences, the legitimate questions raised dispel the misnomer that subsidiarity can somehow let Member States off the hook in respect of Community objectives that have already been ratified.

References under Article 177 EC may be relevant to subsidiarity in two ways. First, where a private citizen is involved in litigation before a domestic court, the question of whether the Community measure in question is valid may have to be determined, in accordance with Article 3b, thus requiring the opinion of the Court of Justice. Alternatively, national legislation may be called into question, to determine that its subject matter does not fall within exclusive Community competence. In these instances, the Court of Justice would be required to issue guidelines on the division of powers generally and on the principle of subsidiarity.

¹⁰⁶ Palacio González, *supra* note 76, p. 365.

¹⁰⁷ Harrison, *supra* note 88, p. 433.

In general terms, substantive jurisdiction for judicial review is based on one fundamental question: does the issue in question fall within exclusive Community competence or not? This is a justiciable legal question, since Community competence is conferred by the EC Treaty. While the conclusions of the European Council on the application and interpretation of subsidiarity *may* be taken into account by the Court of Justice, the Court is not under any legal obligation to adopt these non-binding guidelines. It can look at the legal basis of the measure as well as the statement of reasons given in the preamble which, in accordance with European Council guidelines, justifies its adoption.¹⁰⁹ If a matter is deemed *not* to be within exclusive Community competence, however, the question becomes, can the objective be better achieved at Community or Member State level? It is at this stage that economic and political as well as legal criteria are involved in the application of subsidiarity. Thus Toth concludes: “[t]he Court has only one power: to annul; but it cannot substitute its own decision for the challenged act, nor vary or correct its terms. By so doing...under the guise of judicial review, it would assume the role of the supreme legislature in the Community.”¹¹⁰

Subsidiarity is also relevant to the supremacy of Community law, where there are conflicting EC and national measures. This situation involves a determination of which level of authority had competence to act in the first place. But once this has been resolved, given that the subsidiarity does not call into question the powers conferred on the Community by the EC Treaty, the European Council has concluded that the principle of supremacy of EC law is not affected.¹¹¹

¹⁰⁸ Bernard. *supra* note 39, p. 652.

¹⁰⁹ Edinburgh Conclusions, *supra* note 37: this is discussed further in Chapter 4 *infra*.

¹¹⁰ Toth, *supra* note 102, p. 283.

¹¹¹ Edinburgh Conclusions, *supra* note 37, p. 3, para. 4.

From another perspective, Schilling, *supra* note 1, argues that subsidiarity *does* place certain limitations on the supremacy of EC law; he notes that “...a uniform application of EC law throughout the Community remains...a worthwhile effort...[but] the express sanctioning of the subsidiarity principle in the TEU has pushed a different point of view to the fore, *i.e.* that matters should be dealt

(iii) Is Subsidiarity Retrospective in Application?

In Annex 2 of the European Council Conclusions, the Commission reviewed "...all proposals pending before the Council and Parliament in light of the subsidiarity principle."¹¹² In addition, the Commission identified a number of *existing* measures that it intended to scrutinise in light of the renewed emphasis on the imposition of *minimum* standards. This review of existing as well as proposed legislation, based entirely on Article 3b EC, raises a potentially serious question in terms of retroactivity. If subsidiarity is deemed retrospectively applicable, Community measures that had been considered valid could be challenged, on the grounds that Member State action would have 'sufficiently achieved' the objective in question. Toth explores this possibility in the context of actions for damages under Articles 178 and 215(2) EC.¹¹³ The implementation of EC legislation sometimes requires heavy financial expenditure on the part of the Member States. If measures are repealed on the basis of subsidiarity, certain expenses will no longer have a valid legal basis. This could, in turn, amount to grounds for claiming compensation. Should this occur, the retroactivity of Article 3b(2) would have to be confirmed by the Court of Justice. But where would a transfer of competence to the Member States leave whole areas of law already developed and implemented at EC level? This scenario would have grave consequences for legal certainty within the European Community more generally. It is far more logical to consider subsidiarity in connection with particular policies arising from the adoption of the Maastricht Treaty, adding further support to the view that the principle will have its greatest impact on the new areas of EC competence.

(iv) Subsidiarity and the Community Institutions: Practical Effects

The Edinburgh Summit Document outlines envisaged roles for all of the institutions in the practical implementation of subsidiarity.¹¹⁴ The European Council foresaw a

with as closely as possible to the citizen. This point of view requires some restrictions to be put on Community law supremacy." (p. 239)

¹¹² Edinburgh Conclusions, *supra* note 37, Annex 2, p. 1.

¹¹³ Toth, *supra* note 102, p. 276.

'crucial role' for the Commission in this context, in light of its power of initiative. In particular, the Commission is required, in a specific recital, to justify in relation to subsidiarity, each initiative taken. The Commission was also given the responsibility of issuing an annual report on the application of Article 3b, for submission to the European Council and the European Parliament. The Council is required to take a decision on the compatibility of a measure with subsidiarity at the same time as its substantive decision on the measure itself. The voting requirements applicable to the substantive issue also apply to the decision on subsidiarity. Where appropriate, in accordance with Articles 189b and 189c EC, the European Parliament will be informed of the Council's position on subsidiarity in respect of any particular measure.

In addition to the Commission's initial review of existing and proposed legislation, Peterson has observed that the introduction of subsidiarity has had a continuing impact on procedures in the Commission: it now attaches specific statements to its proposals, to justify Community implementation of the proposed measure, in accordance with Article 3b EC.¹¹⁵ At the 1993 Copenhagen Summit, the European Council noted specifically that, on a practical level, it is the Commission that determines whether proposals should be introduced in accordance with the procedures outlined at Edinburgh.¹¹⁶ It is difficult to quantify the effect subsidiarity has actually had on policy initiative in practice. It is often felt that the principle has generated more hot air than anything else, and that its impact in reality is negligible. But it is submitted that subsidiarity is sometimes employed superficially, to limit otherwise justifiable EC action, without a substantive examination of whether its application would, in fact, preclude Community intervention: this is discussed further in Chapter 6 *infra*, given the self-censorship undertaken by the Commission in respect of the ambit of its minority language initiatives.

¹¹⁴ *supra* note 27, Annex I, Part III.

¹¹⁵ Peterson, *supra* note 41, p. 131.

¹¹⁶ *cf.* Peterson, *ibid.*, pp. 123-5.

6. CONCLUSION

Article 3b has been associated with confusion far more than it has with clarity. It is tempting to write it off as an ongoing storm in a political teacup, with little practical relevance or effect.¹¹⁷ Perhaps the principal misconception with regard to subsidiarity is that it could somehow have solved the political dilemma which led to its introduction into EC law in the first place. But Toth points to the result of the Danish referendum on the Maastricht Treaty as a firm rejection of this delusion.¹¹⁸ The elastic concept of subsidiarity lends itself to multiple interpretations. The holders of each particular view are wholly convinced that the principle will protect their interests above all competing concerns. But it is exceptionally unwise to build a defence on such a precarious foundation. In the light of the fundamental dispute over exclusive and non-exclusive competences in the European context, "[t]he slavish transposition into this system of the principle of subsidiarity...is a mistake which is bound to cause insoluble conflicts and problems."¹¹⁹ Even the Commission has acknowledged the obscurity of the doctrine, stating in plain terms that subsidiarity may not work in practice simply because each Member State has its own entrenched view of what the principle actually means.¹²⁰ But the very fact of its existence in the EC Treaty, and in particular its conceivable justiciability, indicates that its potential effect cannot be ignored. Because of this, subsidiarity is something of a looming spectre in contemporary EC law. This concern is particularly acute in the context of minority language policy; given the enduring political sensitivity associated with language issues, it is entirely possible that the manipulation of subsidiarity could produce its first landmark significance at the expense of objectively justifiable Community intervention in this sphere, discussed in Chapter 4 *infra*. But equally,

¹¹⁷ Everling, *supra* note 5, at 1070, notes that the relevant provision in the German constitution "...a similar clause, has proved to have hardly any practical meaning."

¹¹⁸ Toth, *supra* note 10, p. 1104; the *Common Market Law Review*, *supra* note 29, p. 244, notes that "[t]he concept of subsidiarity is not a hard and fast rule in constitutional law...It is like quicksand, and allows only for short respite."

¹¹⁹ Toth, *supra* note 10, p. 1091.

subsidiarity can *require* co-ordinated policy-making in this domain; perhaps it is this truth more than any other that haunts the Member States. What is clear, however, is that the principle will only be applied usefully when it is not viewed as the weapon of *any* level of authority, when the merits of each particular policy issue take precedence over politics.

¹²⁰ *cf.* de Búrca, *supra* note 29, p. 266.

CHAPTER 4

LANGUAGE AND COMMUNITY CULTURAL POLICY

1. INTRODUCTION

The fourth recital of the Preamble to the Treaty on European Union (TEU) outlines the desire of the Member States to “...deepen the solidarity between their peoples while respecting their history, their culture and their traditions.” Article 3 EC sets out functions for the Community, including, at paragraph (p), “...a contribution to education and training of quality and to the flowering of cultures of the Member States.” Title IX or Article 128 EC (introduced by the TEU) substantiates the role of the Community in cultural policy:

1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Community shall be aimed at encouraging co-operation between Member States and, if necessary, supporting and supplementing their action in the following areas:
 - improvement of the knowledge and dissemination of the culture and history of the European peoples;
 - conservation and safeguarding of cultural heritage of European significance;
 - non-commercial cultural exchanges;
 - artistic and literary creation, including in the audio-visual sector.
3. The Community and the Member States shall foster co-operation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty.
5. In order to contribute to the achievement of the objectives referred to in this article, the Council:
 - acting in accordance with the procedure referred to in Article 189b and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedures referred to in Article 189b;
 - acting unanimously on a proposal from the Commission, shall adopt recommendations.

There was no equivalent provision in the EEC Treaty but the adoption of Article 128 represents “...a codification of activities already pursued at least tangentially by the

Community....”¹ It can, therefore, be assumed that the provision was introduced to clarify an existing but ambiguous policy direction. It has also been suggested that Articles 3(p) and 128 EC should be read in light of Article F(1) TEU, which relates to respect by the Union for the national identities of the Member States.²

The Treaty provisions listed above demonstrate an attempt by the Community to balance its involvement in cultural affairs with the maintenance of an appropriate level of autonomy for the Member States. In reality, this has not been achieved. Article 128, for example, has been exceptionally badly formulated. The Member States were especially concerned to establish the boundaries of EC competence, so that the focus is placed squarely on what the Community *cannot* do rather than on what it *could* do, or indeed, on what it has already achieved in this domain. At the most basic level, culture is not actually defined. Lane observes succinctly that “...its ‘flowering’ [is] more botanical than justiciable...”,³ leaving its interpretation obscure and wholly dependent on subjective analyses. Curiously, Dashwood lauds the new Treaty provisions, including Article 128, as examples of “...tight drafting [which] would seem to reflect a lack of confidence in...institutional self-restraint...regrettably but understandably....I believe it is a style friends of the Community should favour.”⁴ It is difficult to imagine, however, that ‘friends’ of the Community would welcome an at once ambiguous and restrictive provision that reflects neither the policies developed by the Community to date nor contemporary European cultural concerns.

The unfettered optimism displayed by proponents of an EC minority language policy, in respect of the potential of Article 128 to bolster and legitimate their claims, seems

¹ Robert Lane, “New Community competences under the Maastricht Treaty”, (1993) 30 *Common Market Law Review*, 939-979 at 944.

² AnneMarie Loman, Kamiel Mortelmans, Harry Post and Stewart Watson, *Culture and Community Law: Before and After Maastricht*, (Deventer, Boston: Kluwer Law and Taxation Publishers, 1992), (hereafter Loman *et al*), p. 190.

³ Lane, *supra* note 1, p. 953.

⁴ Alan Dashwood, “The limits of European Community powers”, (1996) 21 *European Law Review*, 113-128 at 122.

misplaced, at least from a superficial reading of the provision. An inherent tension is reflected by the idea that the Community is seeking to foster a common European consciousness to generate increased popular support for the development of the European Union. But while referring to a certain extent to common cultural heritage and history, to emphasise synthesis and unity, the Community has been careful to foster concurrently an appreciation of and respect for diversity. This has both cultural and political import. From the cultural perspective, the diverse cultures, traditions and languages of Europe are a vital component of its driving cultural energy. Ensuring that diversity can thrive in the throes of economic and political centralisation is thus not only an interest but a responsibility for the Community, as argued in Chapter 1 *supra*. In the political sense, guarantees of respect for diversity have astute symbolic significance, as an additional reassurance that state sovereignty is not being consumed by the European ideal. Again, this aspect of Article 128 is particularly enhanced when read in conjunction with Article F(1) TEU. But these seemingly polar ideals can actually be combined: there is nothing in either Article 128 EC or Article F(1) TEU to prevent the encouragement of a *common* consciousness based on respect for *diversity*, on a common appreciation of difference. 'Common' does not coincide intrinsically with assimilation. The challenge now faced by the Community is the implementation of the objectives of Article 128 EC in a way that respects the sovereignty of the Member States yet does not compromise economic and political ambition to a degree of ineffectiveness. The wording of Article 128 itself, however, may be a fundamental obstacle in this context, exacerbated by the requirement of unanimous voting in the Council: these issues are discussed in detail *infra*. Weatherill, however, takes a pragmatically optimistic view: "...however anodyne the detailed provisions of the new titles introduced by the TEU may appear, their real importance lies in their existence, which generates obligations to pursue the policy sketched by the Treaty."⁵ It is on this basis that Article 128 is analysed, so that its potential is not smothered by limitations,

⁵ Stephen Weatherill, *Subsidiarity and Responsibility*, (University of Nottingham, Research Paper, 1992), p. 5.

which certainly exist, but which may not be inherently fatal to the development of an effective Community cultural policy.

2. DEFINING CULTURE

As will become apparent, Community policy to date has been concentrated on what might be termed the 'tangible' aspects of culture *i.e.* cultural property, such as art treasures, archaeological heritage, literature and, more recently, the media, particularly film and television. Any measures taken by the institutions in favour of minority languages, described in Chapter 2 *supra*, have been largely divorced from cultural policy *per se*. It must be established at the outset, then, that this distinction is grounded in practice rather than philosophy or necessity: otherwise, Article 128 EC would be innately irrelevant to language concerns

Surprisingly, McMahon, author of one of the few texts dealing primarily with EC cultural policy, does not define the scope of the term itself.⁶ In contrast, Loman *et al* put forward a broad interpretation of culture at the outset, as including:

...all activities which in the Member States are commonly considered as being a legitimate object of their cultural policies, such as the promotion of the contemporary arts (including film and audio-visual products, literature, dance and ballet, music, architecture and drama), the preservation of the national cultural heritage and the promotion of the national language and cultural identity.⁷

In this definition, language concerns are included along with the more traditional, tangible elements of cultural policy, but only in terms of promoting 'the national' language and cultural identity, which could exclude minority languages. Church and Phinnemore develop a similar, multifaceted definition of culture, which can "...mean either the fine arts and literature or, as in the Community context, those wider practices and patterns which help to define national identity."⁸ But this definition

⁶ Joseph A. McMahon, *Education and Culture in European Community Law*, (London; New Jersey: The Athlone Press, 1995); *c.f.* also reviews by Julian Lonbay, (1996) vol. 21:1 *European Law Review* 88-89, and Catherine Seville, (1995) vol. 54:3 *Cambridge Law Journal* 635-637.

⁷ Loman *et al*, *supra* note 2, p. x of Preface (emphasis added).

does not refer to just one 'national' language. The promotion of linguistic diversity can constitute a central feature of a state's 'national' identity, as evidenced by the relevant constitutional provisions of many EC Member States, listed in Appendix I. The protection of culture on the basis of its embodiment of identity is further advocated by Roberts, in the specific context of cultural goods.⁹ She argues that cultural property should only be retained at national level in limited circumstances, where the objects in question 'capture the spirit of the nation' or have an ability to 'capture and promote the identity of a culture'. Significantly, Roberts admits that "[o]bjects rarely meet this definition."¹⁰ Language, on the other hand, is a clear example of a concept that fulfils the conditions. Following on from this, di Lusignano argues that regional languages exemplify regional cultures.¹¹ This was recognised by the Commission itself, in the context of mother tongue education for the children of migrant workers, where it confirmed that "[t]he Commission justifies the teaching of mother tongues to migrants as part of the TEU's guarantees of protection of national identities, by extending the concept of national identity to include the cultural identities of all citizens of a Member State."¹² This express emphasis on pluralism in the cultural context is another positive indicator of sympathy at Community level for minority as well as national languages. Moreover, it further displaces the notion that 'national', in the context of culture, identity or language, must always be read literally.

⁸ Clive H. Church and David Phinnemore, *European Union and European Community: A Handbook and Commentary on the Post-Maastricht Treaties*, (Hemel-Hempstead: Harvester Wheatsheaf, 1994), p. 507; cf. also A. Forrest, "La dimension culturelle de la communauté européenne: Les ministres de la culture explorent le terrain", (1987) 307 *Revue du Marché Commun*, 320-332 at 327.

Joseph H. Kaiser summarises that since "...Europe is rich and pluralistic in its culture, the culture of the European policy should be pluralistic too, and the dimensions should be many." [from "Final conclusions" in Jürgen Schwarze and Henry G. Schermers (eds.), *Structure and Dimensions of European Community Policy*, (Baden-Baden: Nomos, 1988), 237-8 at 238.

⁹ Elizabeth L. Roberts, "Cultural policy in the European Community: A case against extensive national retention", (1993) vol. 28:1 *Texas Journal of International Law*, 191-228 at 192 *et seq.*

¹⁰ *ibid.*, p. 207.

¹¹ Livio Missir di Lusignano, "Communauté et culture", (1994) 376 *Revue du Marché Commun*, 181-194 at 188.

¹² Commission of the European Community, *Report on the Education of Migrants' Children in the European Union*, COM (94) 80 Final (Brussels, 25 March 1994), p. 6.

In arriving at their own interpretation of 'culture', Loman *et al* distinguish between traditional and anthropological approaches. Prott is referred to as epitomising the traditional position; he defines culture as "...the highest intellectual achievements of human beings: the musical, philosophical, literary, artistic and architectural works, techniques and rituals which have most inspired humanity and are seen by communities as their best achievements."¹³ The society-based, anthropological definition is typified by Guillaumin:

...the totality of the knowledge and practices, both intellectual and material, of each of the particular groups of a society, and - at a certain level - of a society itself as a whole. From food to dress, from household techniques to industrial techniques, from forms of politeness to mass media, from work rhythm to the learning of family rules, all human practices, all invented and manufactured materials are concerned and constitute, in their relationships and totality, 'culture'.¹⁴

The preservation and promotion of minority languages fits more with this second approach. It may be recalled, however, that Loman *et al*, while their interpretation is based more on the traditional definition of culture, adapted that outlook to include an express reference to language concerns. Thus, a pragmatic definition that is not tied firmly to either the traditional or anthropological school appears to be the ideal solution to the question of defining culture. And in the absence of express Treaty guidance, flexibility and pragmatism can similarly form the basis of an appropriate definition of culture for the purposes of Community law. A contemporary conception of culture in the EC context has been expressed by O'Toole:

Culture is not merely about works of art, and it follows that the cultural dimension of the European Community is about much more than aesthetics. Culture is the ground on which people are empowered to participate in their society. Culture is both the social contribution to the formation of the individual person, and the collective tools - values, language, means of communication, ideas of excellence, the imaginative sympathy by which one individual can make sense of the experience of another individual - by which an individual can contribute to society. The question of culture and the European Community is

¹³ Loman *et al*, *supra* note 2, p. 1, referring to Lyndel V. Prott, "Cultural rights as peoples' rights in international law", in James Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1992), 93-106 at 94.

¹⁴ Loman *et al*, *ibid.*, referring to C. Guillaumin, "Women and cultural values: Classes according to sex and their relationship to culture in industrial society", (1979) *Cultures* 41.

therefore intimately bound up with the question of democracy and the European Community.¹⁵

Thus, language can clearly come within the remit of cultural policy, in both general and EC contexts. But Community policy to date has not reflected this diversity of philosophy. Following a summary of the measures developed by the institutions in the field of culture, the potential inclusion of language into EC cultural policy is assessed, in respect of the substantive provisions of Article 128 EC.

3. COMMUNITY ACTION IN THE FIELD OF CULTURE TO DATE

Given that the EEC Treaty did not contain any explicit reference to culture, it is not surprising that direct action in this field *before* the introduction of Article 128 EC was relatively piecemeal and arbitrary. The institutions were unsure of the parameters of this fundamental yet uncharted policy area since, at that time, the Community was clearly acting on the "...fringes of legal competence."¹⁶ The Member States, undoubtedly influenced by the corrosive impact of European integration on other fringe policy areas, were anxious to curb the extension of central authority and were especially concerned about the impact of a Community cultural policy on their national sovereignty. This politically charged atmosphere coloured the background of the initial measures adopted towards the formation of an EC cultural policy.

A. Chronological Development of EC Cultural Policy¹⁷

Prior to the inauguration of the EEC, the General Report of the Hague Congress (1948) confirmed that any model for European union would respect ideological pluralism, cultural diversity and the liberty and rights of all human beings.¹⁸ This

¹⁵ Fintan O'Toole, "Culture and media policy", in Patrick Keatinge (ed.), *Ireland and EC Membership Evaluated*, (London: Pinter, 1991), 270-276 at 270-1.

¹⁶ Seville, *supra* note 6, p. 636.

¹⁷ Since the Community did not generally include language issues in its cultural policy measures, this section merely summarises the principal developments; for more detail on cultural policy in general, cf. McMahon, *supra* note 6, Loman *et al*, *supra* note 2 and Roberts, *supra* note 9.

philosophy, which foreshadows the presently evolving ideology of European unity, reflected the principal concerns of post-war Europe, but its express realisation was not of immediate concern to the architects of the then primarily economic treaties. Nevertheless, McMahon traces the original basis for Community cultural policy to Article 36 of the Treaty of Rome.¹⁹ This provision confirms that prohibitions or restrictions on imports and exports may be justified on the grounds of protection of 'national treasures possessing artistic, historic or archaeological value'. These first concessions to EC cultural policy are confined to the protection of cultural property. But from early times, both the European Parliament and European Council envisaged a broader role for the Community in cultural affairs.²⁰ Thus, in the 1960s and 1970s, cultural co-operation was seen as an aspect of political unity more generally, but economic and other political concerns dominated, if not monopolised, the Community agenda.

Eventually, the Commission codified the objectives of these general policy statements in a series of official documents and declarations. The first of these, *Community Action in the Cultural Sector*, was issued in 1977.²¹ The aspects of cultural policy listed as coming within Community competence included free trade in cultural goods, prevention of the theft of cultural goods, the preservation of archaeological heritage, free movement and establishment for cultural workers, taxation in the cultural sector and the harmonisation of copyright laws. Despite this seemingly comprehensive range of issues, Massart-Piérard identifies the 1977 Communication as the first attempt by the Community to *restrict* the definition of

¹⁸ cf. Françoise Massart-Piérard, "Limites et enjeux d'une politique culturelle pour la communauté européenne", (1986) 293 *Revue du Marché Commun*, 34-40 at 34.

¹⁹ McMahon, *supra* note 6, p. 12; in a different context, Article 131 EEC refers to 'cultural development' in respect of associations with non-European countries. In contrast, Loman *et al*, *supra* note 2, p. 1, state that there is no cultural object or purpose whatsoever in the Treaty of Rome.

²⁰ cf., for example, Resolution of the European Parliament calling for a Community policy on culture ([1974] OJ C-62/5); statement issued by the Summit of Heads of State and Government at The Hague in 1969, recognising the need to preserve Europe as 'an exceptional seat of development, culture and progress' (cf. McMahon, *supra* note 6, p. 122).

²¹ EC Bulletin Supp. 6/77.

culture;²² the scope of the 'cultural sector' was limited to persons and undertakings involved in the production and distribution of cultural goods and services, thereby already coming within general economic policy to a large extent.²³ In this context, McMahon notes that "...Community competence in the cultural sector was thus seen as an extension of the economic and social provisions of the Treaty...."²⁴ The promotion of transnational co-operation between the Member States and the cultural establishments therein, as well as potential co-operation with the Council of Europe, was seen as the most appropriate function for the EC in the cultural sector.

A draft Council Resolution, based on these proposals from the Commission, was drawn up but not adopted, notwithstanding support from both the European Parliament and the Economic and Social Committee. Despite this setback, the Commission went on to publish *Stronger Community Action in the Cultural Sector* in 1982.²⁵ Again, the document focused on trade in cultural goods, free movement and establishment for cultural workers, enlarging the cultural audience and the conservation of archaeological heritage. Notwithstanding the title of the communication, the Commission itself was careful to point out that the role of the Community in cultural issues was a limited one:

There is no pretension to exert a direct influence on culture itself or to launch a European cultural policy; what stronger Community action in the cultural sector means in effect is linking its four constituents...more closely to the economic and social roles which the Treaty assigns to the Community, to the resources - mainly legislative - that it provides, and to various Community policies.²⁶

But the 1982 document, in spite of its limited philosophy, did have important practical consequences. McMahon notes that a series of informal meetings between

²² Massart-Piérard, *supra* note 18, p. 37.

²³ The Document describes Community support for culture as "...gradually creating a more propitious economic and social environment." (*supra* note 21, p. 5); culture as an element of economic policy in general is discussed further in section B *infra*.

²⁴ McMahon, *supra* note 6, p. 128.

²⁵ EC Bulletin Supp. 6/82.

²⁶ *ibid.*, p. 32.

the Ministers for Culture of the Member States began to take place in 1982, followed, in 1984, by the first formal Council meeting of this kind. Furthermore, the discussions at these meetings had evolved somewhat from the original view that cultural policy was just a peripheral aspect of economic policy in general. In 1983, a Solemn Declaration on European Identity, issued at the European Council meeting in Stuttgart, had identified the need for widespread awareness of a 'common European cultural heritage', to boost public affirmation of European unity.²⁷ This text introduced a new impetus for the pursuit of cultural co-operation, as an element of the far broader attempt to legitimise intensifying economic and political union. The formal Council meeting of the Ministers for Culture in 1984 was seen as a crucial step in the implementation of the 1983 Declaration.

Language issues did merit some consideration at these meetings, usually in the context of promoting language education and translation facilities. This conservative theme may be contrasted with the increasing momentum in favour of minority languages evident within the European Parliament at this time, detailed in Chapter 2 *supra*. It must be stressed, however, that consideration by the Council of any aspect of cultural policy was still at a tentative stage. Legal competence and financial difficulties were obvious restrictions, combined with the suspicions of Member States who feared the seemingly inevitable inculcation of an assimilative 'Euroculture'. The decision of the European Court of Justice in *Groener* was something of a mixed blessing in this context: the Court of Justice acknowledged relative Member State autonomy in the determination of language policy, yet affirmed its own jurisdiction to assess the resulting national policies for conformity with the fundamental principles of Community law.²⁸

The growing significance of cultural issues within the EC was reflected by the inclusion of the following provision in the 1984 Draft Treaty on European Union:

²⁷ Bull.EC 1983/6.

²⁸ Case 379/87 *Groener v. Minister for Education and the City of Dublin Vocational Education Committee*, [1989] 2 ECR 3967, analysed in Chapter 2 *supra*.

- 1) The Union may take measures to:
 - promote cultural and linguistic understanding between citizens of the Union;
 - publicise the cultural life of the Union both at home and abroad;
 - establish youth exchange programmes.
- 2) The European University Institute and the European Foundation shall become establishments of the Union.
- 3) Laws shall lay down rules governing approximation of the laws of copyright and the free movement of cultural goods.²⁹

In the context of the scope of cultural policy, the drafters proceeded along much the same lines as the Commission to that date, but cultural and linguistic issues were expressly linked as a joint concern. The emphasis on 'mutual understanding' is firmly rooted in the 'common cultural heritage' ideology that would, it was assumed, promote integration and unity. This approach was confirmed by the 1985 Adonnino Report on a 'People's Europe'.³⁰ Grounded in similar terminology, and with the added incentive of completing the internal market by 1992, *A Fresh Boost for Culture in the European Community* was published by the Commission in 1987.³¹ Aside from reiterating most of the previous policy objectives, this communication significantly strengthened the role of the Community in the audio-visual and technological sectors. Efforts on behalf of the book sector were intensified, with specific reference to minority languages regarding the translation of important literary works.³² Once again, the Community styled itself as the co-ordinator of national and regional cultural authorities.

In its final communication before the ratification of the TEU, *New Prospects for Community Cultural Action* in 1992, the Commission urged that renewed consideration be given to the role of the Community in cultural affairs, given the 'unprecedented opportunity for cultural co-operation and support' which existed at

²⁹ [1984] OJ C-77/33.

³⁰ Bull. EC Supp. 7/85; cf. p. 21, where it was noted that it is "...through action in the areas of culture and communication, which are essential to European identity and the Community's image in the minds of its people, that support for the advancement of Europe can and must be sought."

³¹ EC Bulletin Supp. 4/87.

³² This objective was supplemented by a separate Council Resolution - [1987] OJ C-309/3 - and deals with translation of works both into and from minority languages.

this time.³³ Reflecting the ideology of Article 128 itself, the Commission directed its attention towards three areas: a 'Community contribution to the flowering of culture in the frontier-free area', promotion of the common cultural heritage and co-operation with non-Member countries and international organisations. The Commission justified the retention of a restrictive cultural agenda on the basis of past Community action, since it could not yet predict whether Article 128 would justify a broadening of that agenda. At a formal Council meeting that same year, the Ministers for Culture went further, however, stating expressly that the cultural agenda of the Community was open to expansion.³⁴ It was noted *inter alia* that future Community programmes may specifically include "...increasing awareness of different cultures and safeguarding the Community's linguistic diversity, as well as promoting respect for shared values."³⁵ In objective terms, the 'Community's linguistic diversity' must include the substantial contribution of its minority languages, although this is not stated explicitly. Whether this view is shared by the Council remains to be seen but the claim is further substantiated by the Commission's report on *Linguistic Minorities in Countries belonging to the European Communities*, published in 1986.³⁶ The Commission advocated both the constitutional recognition of minority languages at domestic level and the implementation of that status in a real and practical sense.³⁷ Despite this progressive theoretical approach, however, the recommendations for Community action, issued at the conclusion of the Report, focus on more traditionally acceptable activities such as support for study/research programmes and the provision of economic aid.³⁸

³³ COM(92) [1992].

³⁴ [1992] OJ C-366/1.

³⁵ *ibid.*, para. 4.

³⁶ Istituto della Enciclopedia Italiana, *Linguistic Minorities in Countries belonging to the European Community*, (Luxembourg: Office for Official Publications of the European Communities, 1986).

³⁷ *ibid.*, p. 234.

³⁸ *ibid.*, p. 235-240.

The absence of a provision on culture in the Single European Act illustrates the ultimate hollowness behind the series of documents published by the Commission in the 1980s, described by de Witte as follows:

[G]overnments like to adopt grandiose declarations on the imperative need of promoting European identity. They also manage to agree on those implementing measures that are at the same time highly symbolic and highly innocuous. But when they are presented with more ambitious, and arguably more effective, proposals which it is perfectly within their powers to adopt, they decline to do so. The impression therefore prevails that the policy of promoting European identity is no more than an effort to spread a favourable image of Europe, without any substance backing it. Such a pretence is of dubious value, and might even be counter-productive.³⁹

The superficiality of Article 128 EC, discussed *infra*, has confirmed the validity of de Witte's observations. This cautious evolution of cultural priorities within the Community reflects the ongoing compromise between the forces of unity and diversity. The significance attached to the common cultural heritage of Europe by the Commission and Council, for example, did little to alleviate the misgivings of certain Member States, who feared the promotion of assimilation in the absence of any co-ordinated response to the contrary from the institutions. The scant, albeit increasing, references to respect for cultural diversity did not clarify its relationship to the broader ambition of European integration. The separateness of the European Parliament's campaign for minority language recognition illustrates pointedly the lack of cohesion in Community policy. The construction of Community cultural policy in this manner perpetuated rather than redressed the employment of a restrictive interpretation of culture. Before outlining the implementation of the Commission's publications, culture is considered in the broader context of fundamental Community law.

B. The Application of General Community Law to Culture

It was noted that most measures taken by the EC in the cultural sphere were merely a redirected application of the general rules and principles set out in the Treaty of Rome. Because of this, Member State cultural policies, ostensibly immune from the

realisation of the common market, have been affected "...more or less by coincidence...", independently of the culture-oriented communications published by the institutions.⁴⁰ This section details some examples of these instances. Seville argues, however, that "[a]t points of intersection, the economic dimensions tend to take priority."⁴¹

De Witte outlines a number of cultural policy areas affected in a peripheral way by the implementation of Community freedoms.⁴² He notes, for example, that the abolition of customs duties applies equally to trade in cultural goods, that workers in the cultural sector come within the rules on free movement, establishment and provision of services, and that the cultural sector is not exempt from competition rules.⁴³ In addition, he stresses that Community law has not only abolished restrictions in this field; it has also imposed positive obligations on Member States, such as Article 48(2) of Regulation 574/72, which entitles migrant workers to receive certain administrative documents in their own language. Similarly, Directive 77/486 requires that Member States should take appropriate measures to ensure that children of migrant workers are educated in the languages of both the host state and the state of origin.⁴⁴

³⁹ Bruno de Witte, "Building Europe's image and identity", in A. Rijksbaron, W.H. Roobol and M. Weisglas (eds.), *Europe from a Cultural Perspective*, (The Hague: Nijgh en Van Ditmar Universitair, 1987), 132-139 at 137.

⁴⁰ Loman *et al*, *supra* note 2, p. ix.

⁴¹ Seville, *supra* note 6, p. 637.

⁴² De Witte, "The scope of Community powers in education and culture in the light of subsequent practice", in Roland Bieber and Georg Reiss (eds.), *The Dynamics of European Law*, (Baden-Baden: Nomos, 1987), 261-278 at 264-5.

For more detail on the intersection of the Community freedoms with cultural issues, *cf.* Loman *et al*, *supra* note 2, as follows: free movement of goods at 24-50; free movement of workers at 50-66; freedom of establishment at 67-75; freedom to provide services at 75-90 and free movement of capital at 90-93.

⁴³ *cf.* also Loman *et al*, *supra* note 2, Chapter 3, which deals with restrictive agreements and practices, dominant positions and merger control; note, however, Article 92(3)(d) EC, which sets out the special position on state aid in the cultural context.

⁴⁴ De Witte, *supra* note 42, argues that "...granting the right to mother-tongue education to children of Community workers may well put under pressure those states that deny the same right to their own national minorities." He observes that such policies have particular effect on regional-unilingual

The provision of state aid is particularly relevant to the cultural sector. Although subsidies of this nature are now condoned specifically by Article 92(3)(d) EC, both individual governments and the EC itself have long granted financial aid to cultural undertakings. In any event, it was argued in Chapter 1 *supra* that financial aid of this kind is unlikely to affect the requisite criterion of trade between Member States. On the particularly sensitive issue of state aid for the film and television industries, Loman *et al* cite an approval by the Commission for aid granted by the British Government for the production of programmes in the Welsh and Scots Gaelic languages.⁴⁵ Provision of state financial support for minority language initiatives, such as the foundation of the Irish language *Teilifís na Gaeilge* television channel in 1996, is extremely important for the maintenance of both quality programming and cultural diversity. In the context of the 1989 Council Directive on cross-boundary broadcasting, the Commission reached a bilateral agreement with the French Government in respect of its domestic quota on the broadcasting of French works.⁴⁶ The Commission emphasised, however, that while the Community acknowledges the role of television in the development of national linguistic policies, such policies must remain within the limits of Community law and, in particular, must be in proportion to the linguistic objective to be achieved. The bilateral agreement might not, then, survive interpretation by the Court of Justice, since it is arguable that the French language, in light of its prevalence and status in France, does not merit the employment of such stringent protectionist policies.

Loman *et al* refer to a written question, put by several MEPs, to illustrate the potential application of the public policy derogation from free movement to language issues.⁴⁷ The general principle is that freedom of movement should be restricted only

systems, *e.g.* Belgium. But Cullen notes that difficulties of implementation have rendered the Directive virtually ineffective in practice: Holly Cullen, "From migrants to citizens? European Community policy on intercultural education", (1996) 45 *International and Comparative Law Quarterly*, 109-129 at 121-125.

⁴⁵ Loman *et al*, *supra* note 2, p. 138; [1992] OJ C-23/3; (1991) *Europe* No. 5530, 8/9 July, p. 13.

⁴⁶ 3 October 1989, [1989] OJ L-298/23; *cf.* Loman *et al*, *ibid.*, p. 156-8.

where the presence of an individual in the host state constitutes a genuine and sufficiently serious threat to public policy. The background to the written question illustrates, however, that these requirements are not always adhered to in practice. A number of Irish citizens arriving in the United Kingdom had been threatened with arrest under the British Anti-Terrorism Act if they refused to 'translate' their Irish-language names into English but, following inquiries by the Commission, the United Kingdom ensured that such incidents would not reoccur in the future.

The *Groener* decision is a clear example of how national policy measures pursuing cultural objectives can be assessed for their compatibility with fundamental Community principles (in this case, the free movement of workers). But, as discussed in Chapter 2 *supra*, the Court of Justice did not apply a typically strict interpretation to its analysis of cultural objectives as a derogation from Community freedoms. Lane argues, however, that the justification of national cultural policy in *Groener* stands in relative isolation from the main body of case-law, pointing out that "[n]ational labelling rules, which may serve to protect linguistic interests, one of the most fundamental aspects of culture, are rarely justified where they inhibit the free movement of goods."⁴⁸ He also lists a number of cases involving the audio-visual sector, where limitations on Community law were not held to be justifiable on grounds of the protection of cultural pluralism.⁴⁹ Lane, in the context of broadcasting, views the inclusion of cultural affairs within the jurisdiction of the Community, even to the limited extent displayed before the adoption of the TEU, as inherently detrimental.⁵⁰ But it must be stressed once again that the Community dimension of cultural issues is largely inevitable, due to the very fact of economic and political

⁴⁷ Loman *et al.*, *supra* note 2, p. 63, referring to Written Question No. 138/88, [1990] OJ C-69/2.

⁴⁸ Lane, *supra* note 1, p. 954, referring to Case 27/80 *Fietje* [1980] ECR 3839 and Case C-369/89 *Piageme v. BUBA Pieters* [1991] ECR I-2971; John Usher, "Languages and the European Union", in Malcolm Anderson and Eberhard Bort (eds.), *The Frontiers of Europe*, (London: Pinter, 1998), 222-234. The basic principle applied by the Court is that labels need not be in the official language of a state, or in the language of a region, provided they are printed in a language which is 'easily understood' by the consumers in that area: *cf.* Chapter 1 *supra*.

⁴⁹ Lane, *ibid.*, p. 955; *cf.* Council Directive 79/112 [1979] OJ L-33/1.

⁵⁰ Lane, *ibid.*

integration, and may prove crucial as a reparative dynamic. Moreover, the application of proportionality and non-discrimination is widely practised in the broader human rights context. In general terms, the debate on Community policy in the audio-visual sector is a particularly heated one. Schilling focuses on the decision of the Court of Justice in *Vereniging Veronica*⁵¹, which stands in contrast to the earlier decisions cited by Lane. Schilling argues that this case demonstrates the conflict between the cultural aspects of television, which come within national interests, and the free provision of services, such as advertising and copyright, falling under Community competence. In this decision, however, the Court decided in *favour* of Dutch legislation geared towards the foundation of a pluralist, non-commercial broadcasting system, on the grounds that this objective was connected with freedom of expression, a fundamental right protected by the Community legal order.⁵² The decisions referred to by Lane pre-date Article 128 EC. Significantly, Lane does observe that the Court made ‘sympathetic noises’ in these decisions; it is arguable, therefore, that lack of competence rather than vision precluded a result more favourable to cultural concerns. As discussed in Chapter 2, *Groener* related to the interpretation of existing Community legislation (Regulation 1612/68) that expressly set out legitimate exceptions to Community law, one of which related to language competence; however unorthodox the Court’s eventual decision, it was dealing with the interpretation of a concrete provision as opposed to an abstract concept such as the safeguarding of cultural pluralism. Since the ratification of the TEU, the Court of Justice has a more definite legal basis upon which to ground its ‘sympathetic noises’; the impact of these changes in practice, if any, is discussed in Chapter 6 *infra*.

C. Promotion of the Cultural Sector by the EC Institutions

The EC institutions have all participated, at one level or another, in supporting cultural activities on a practical basis, in accordance with the official

⁵¹ Case 148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media* [1993] ECR 487; Theodor Schilling, “A new dimension of subsidiarity: Subsidiarity as a rule and a principle”, (1994) 14 *Yearbook of European Law*, 203-256 at 243 *et seq.*

⁵² Note, however, that Schilling, *ibid.*, sees this reasoning as flawed, arguing that the connection with the fundamental right in question was undefined and, therefore, inconclusive.

communications outlined *supra*. Once again, the Commission, strongly supported by the Parliament, initiated developments in this area.⁵³ In 1988, it established the Committee on Cultural Affairs, for the purpose of monitoring the implementation of any actions to be decided upon by the Council. The Commission appointed a Commissioner for Cultural Affairs and set up the Department of Cultural Affairs within DGXXII, which deals with the audio-visual sector, information, communication and culture. Rasmussen also highlights the role of the Commission in initiating cultural policy *outside* the institutional framework, encouraging co-operation among the Member States and the various cultural institutions and authorities.⁵⁴ The Parliament established the Committee on Youth, Culture, Education, the Media and Sport, as well as an Intergroup on Minority Languages. It has also adopted a number of resolutions on cultural issues, not least those detailing its extensive work on minority language issues throughout the 1980s and early 1990s, discussed in Chapter 2 *supra*. McMahon suggests, however, that the Commission and Parliament diverge on their respective interpretations of the *future* of cultural policy, with the Commission taking the much more restrictive view.⁵⁵ The related application of subsidiarity to Article 128 EC is discussed *infra*.

The Council is generally regarded as having avoided genuine or substantive commitment to the implementation of cultural objectives, despite continuing perfunctory support for the work of the Commission. This is hardly surprising, however, given doubts over legal competence, along with the defensive attitude of most Member States towards their sovereignty in the cultural domain.

In what is generally regarded as a seriously underfunded sector at all levels - regional, national and international - EC financial assistance for cultural activities has been particularly welcome. A number of projects and initiatives have received support

⁵³ McMahon, *supra* note 6, p. 156.

⁵⁴ Hjalte Rasmussen, "Structures and dimensions of EC cultural policy: L'Europe des bonnes volontés culturelles", in Schwarze and Schermers (eds.), *supra* note 8, 185-194 at 193.

⁵⁵ McMahon, *supra* note 6, pp. 170-1.

from the ESF, ERDF and the European Investment Bank. Community institutions have also granted specific subsidies for cultural activities. Grants have been allocated, for example, to a number of projects committed to the promotion of minority languages and cultures, including:

- support granted to the European Bureau for Lesser Used Languages, (including the maintenance of the Mercator language information network);
- pilot experiments in the field of education (*e.g.* teaching methods);
- projects aimed at promoting the use of information technology and the mass media;
- translation of contemporary literary works both into and from minority languages;
- support for information centres on minority languages throughout the Community.⁵⁶

It must be remembered that expenditure on cultural projects was largely “...without proper legislative basis...”⁵⁷ prior to the ratification of the Maastricht Treaty. Indeed, the continued provision of monetary assistance for the European Bureau for Lesser Used Languages rest on a precarious premise at present.⁵⁸ But while financial aid and subsidies are an essential and integral part of a successful cultural policy, they do *not* amount to a complete or effective cultural policy *per se*; it is crucial that the broader issue of ensuring respect for and accessibility to languages and cultures is both considered and realised.

The role of the Court of Justice in the development of EC cultural policy is somewhat more controversial. Prior to the codification of competence in Article 128 EC, the identification of a legal basis for cultural policy was an obvious consideration. But commentators are unanimous in their criticism of the Court’s failure to address this ambiguity. McMahon contrasts this lack of initiative with the Court’s furtherance of “...another nascent area of Community competence, namely education.”⁵⁹ As already

⁵⁶ *cf.* Loman *et al*, *supra* note 2, pp. 164-167.

⁵⁷ De Witte, *supra* note 42, p. 269.

⁵⁸ *cf.* (1996) vol. 13:3 *Contact* 1; Chapter 6 *infra*.

noted, the decisions of the Court on the labelling of foodstuffs do not correspond with its stance in *Groener*; it has also been seen that there are contradictions within its decisions on broadcasting policy. The Court declined repeatedly to pronounce on the Community's cultural agenda, opting instead to deal with the policy or freedom in question in that specific context only. The Advocates General have been somewhat more forthcoming, however, in their acknowledgement of the impact of Community law on the cultural sector.⁶⁰ Initially, the Court was attempting to uphold an element of cultural policy - the philosophy of cultural pluralism - without having any specific Treaty provisions upon which to rely for support. Its distorted endorsement of a dubious language/employment link in *Groener* proves illustrative. Whether the Court has pronounced on language issues more openly following the ratification of Article 128 EC is examined in Chapter 6 *infra*.

De Witte commends the widespread participation of *all* institutions in the realisation of cultural policy, suggesting that they 'build on each other's practice' and thus generate mutual persuasion to act.⁶¹ But the fragmentary nature of EC cultural policy to date, combined with problems of legal competence, Member State sensitivity and resistance, and difficulties of implementation, has been far from effective. Issues such as legal competence appear to have been redressed by Article 128 EC and are examined in detail *infra*. Dondelinger believes, however, that the very genesis of Community involvement in cultural affairs, notwithstanding the absence of an impetus in the original EEC Treaty, must be viewed as a positive phenomenon that can now evolve into a more organised, coherent policy.⁶² Whether that prophesy can be realised remains to be seen.

4. ARTICLE 128 EC: AN APPRAISAL

⁵⁹ McMahon, *supra* note 6, pp. 162-3.

⁶⁰ *cf.* for example, the opinion of Advocate General Darmon in *Groener*, *supra* note 28, discussed in Chapter 2 *supra*.

⁶¹ De Witte, *supra* note 42, p. 270.

⁶² Jean Dondelinger, "1992: Les relations de la communauté et de la culture", (1990) 334 *Revue du Marché Commun*, 77-79 at 77.

A. Introduction

The unfolding of EC cultural policy has been a conspicuously disjointed process. The need for a cohesive, proactive policy is outlined by Mourik:

The preservation of the present pluriformity requires active measures on the part of the governmental institutions involved. This would not be necessary if cultural co-existence only had qualitative aspects. In that case, the various cultural areas would equally fertilise, enrich, and thus preserve one another. Unfortunately, there are also quantitative factors, and quite strong ones at that. As a result, the large(r) cultural areas put a constant pressure on the small(er) ones....This may perhaps hold most strongly for linguistically determined products, but also to a considerable extent for other ones...Pluriformity should, therefore, not only be stimulated as a creative power which benefits all subcultures...but also as a principle of safeguarding...It must...be realised that cultural co-operation in the EEC is diametrically opposed to the principles of economic co-operation which form the basis of the EEC. [T]he latter are aimed at the creation of a community, unification, while cultural co-operation in its turn presupposes the independence of the co-operating partners.⁶³

The dilemma projected by the legislative embodiment of a European cultural policy is clearly expressed in this extract. Since the Member States have repeatedly insisted that cultural sovereignty must be ensured, it might be assumed that they would, in turn, be eager to promote cultural diversity. But cultural diversity inherently includes minority cultures and languages in addition to national ones. This truth is not always reflected in national cultural policies; the non-recognition of indigenous minority languages in France, for example, is compounded by a vigorous programme of protection for the French language itself.

Loman *et al* discuss the objectives of Article 128 EC.⁶⁴ It aims to incorporate multiple interests in its determination of the boundaries of Community competence in cultural matters, from the perspective of preserving Member State autonomy to the challenges posed by completion of the Internal Market and the possibility of the expansion of the Union towards Eastern Europe.⁶⁵ As noted at the beginning of this

⁶³ M. Mourik, "European cultural co-operation", in Rijksharmon *et al* (eds.), *supra* note 39, 19-21 at 19-20.

⁶⁴ Loman *et al*, *supra* note 2, p. xi.

⁶⁵ Dondelinger, *supra* note 62, p. 79.

Chapter, Article 128 EC is typically regarded as having justified Community cultural policy *after* the fact.

Various EC policies that have a consequential impact on the cultural sector, such as taxation, continue to be enforced under general economic jurisdiction and not specifically on the basis of Article 128, which focuses on 'pure' cultural issues.⁶⁶ Temple observes that economic action in the cultural sector should not be underestimated, using the specific context of minority languages as an example: "...the EC can help [by] bringing economic assistance which may halt the drain of speakers away from lesser-used language regions and [by facilitating] cultural links which would (and already do) provide inspiration and support for the defenders of the languages."⁶⁷ She acknowledges, however, that economic intervention alone may be seen as 'window dressing', which does not tackle core problems, as already argued.

Education policy under Article 126 EC is not discussed in detail in this Chapter: although similar to the development of cultural policy in many ways, it is a distinct issue that receives ample commentary in many of the references already cited *infra*.⁶⁸ The Commission, for example, deals with culture and education in two distinct Directorates General, under the authority of two separate Commissioners; meetings of the Council that deal with education and culture are also entirely distinct.⁶⁹ The following similarities are, however, highlighted. In practice, it is often difficult to separate the two areas, as with, for example, Community programmes for language education (*e.g.* *LINGUA*). Although activity in the education sphere preceded that in

⁶⁶ *cf.* Loman *et al*, *supra* note 2, p. 193.

⁶⁷ Rosalind M. Temple, "Great expectations? Hopes and fears about the implications of political developments in Western Europe for the future of France's regional languages", in M.M. Parry, W.V. Davies and R.A.M. Temple (eds.), *The Changing Voices of Europe*, (Cardiff: University of Wales Press, 1994), 191-211 at 207.

⁶⁸ In particular, McMahon, *supra* note 6, pp. 3-120; Lane, *supra* note 1, pp. 947-951.

⁶⁹ Notwithstanding the fact that the Member State ministers often share both portfolios at domestic level and, as a result, represent their states at both Council meetings.

the cultural arena by almost a decade, both policies developed along a functional basis. Both were originally thought to be outside the ambit of Community law. But while the Court of Justice played a very significant role in the development of EC education policy, it did not nurture Community cultural policy to the same extent.⁷⁰ Both areas fundamentally reflect the identities of the Member States, which has led to the curbing of Community ambition by new provisions in the EC Treaty.⁷¹ The implementation of Article 126 is, however, governed by less draconian procedures than those contained in Article 128(5), which require unanimous rather than qualified majority voting. Another difference between the two provisions is that Article 126 does not contain a policy integration clause (Article 128(4)): thus, the Community is not obliged to take educational interests into consideration when legislating in other policy areas.

Article 128 EC reflects several strands of developed Community policy, such as its function as co-ordinator, references to common cultural heritage and respect for the role of other international organisations. The opening paragraphs of this Chapter are recalled by referring to Lane, who remarks that Article 128 "...not only broadens quantitatively and qualitatively the pantheon of Community competences; it also confers upon them legitimacy, flesh, coherence, new direction - and not a little confusion."⁷² He acknowledges that Community competence can now be regarded as "...direct and active, as opposed to indirect and reactive."⁷³ But Article 128 does not reconcile the traditionally narrow construction of culture with the contemporary requirement of the protection of *cultures*. Furthermore, the ethos of EC policy on

⁷⁰ McMahon, *supra* note 6, p. 158; on this basis, McMahon is far more optimistic about the future of EC education policy than he is with regard to culture: *cf.* p. 174.

⁷¹ In this context, Scott has written that "[e]ducation is felt to be close to the core of national identity and is sometimes a bastion of a particular language, culture or community." [Dermott Scott, "Education", in Keatinge (ed.), *supra* note 15, 260-269 at 261]; he refers expressly to Danish resistance to the evolution of Community education policy, and to the UK's reluctance to adopt the LINGUA programme. In contrast, he refers to *Groener*, as a 'successful defence' of the right to attach language requirements to teaching posts.

⁷² Lane, *supra* note 1, p. 944.

⁷³ *ibid.*, p. 952.

culture will have to mark a radical departure from the more widespread idioms of centralisation and homogenisation.⁷⁴

By focusing on its shortcomings, it is too easy to lose sight of the undeniable significance of Article 128's incorporation into the EC Treaty, despite the fact that basic issues such as the scope of culture itself, the titles and portfolios of the government ministers under whose administration cultural policy falls and the extent and stringency of national cultural policies all differ fundamentally throughout the Member States. The following paragraphs analyse the text of Article 128 EC to ascertain its effectiveness as the foundation for EC cultural policy and, more particularly, to assess whether or not the provision can encompass minority language policy. The issues raised in respect of the individual subsections are then drawn together, to present a more complete and coherent interpretation of the provision.

B. Article 128(1)

The Community shall contribute...

The role of the Community is classified as 'contributor' but already, drafting ambiguities arise. Does the word 'contribute' restrict Community activity to policies already enunciated, or to be enunciated, by the Member States? This interpretation would preclude the formulation of initiatives at EC level, rendering the *raison d'être* of Article 128 entirely impotent. A Community 'contribution' must, therefore, be interpreted in a manner that empowers the institutions to conceive activities in the cultural sector above and beyond those already determined by the Member States. Whatever the logistical problems, the majority of organisations and individuals involved in the cultural and linguistic sectors welcome the involvement of the EC, as discussed in Chapter 1 *supra*. This may seem unusual, given the resistance of Member States, which is more generally documented; the identified perception of the Member States as the opponents rather than defenders of sub-national cultural, and particularly linguistic, concerns is especially relevant here.

...to the flowering of the cultures of the Member States...

Despite criticism directed towards this wording,⁷⁵ proponents of cultural and linguistic diversity have professed an extraordinary degree of confidence in this (and the succeeding) phrase. This can be demonstrated by considering the Preamble to the 1994 Killilea Resolution, discussed in Chapter 6 *infra*. The word ‘flowering’, although it seems unusual, even eccentric, can be traced to discussions long preceding the adoption of the TEU; it has its origins in the French term, *épanouir*, which does indeed translate to ‘flower or blossom’ but can also be read as ‘to open up or open out’. It is particularly significant that the term ‘culture’ is written in its plural form, quelling apprehension over the dominance of an assimilative cultural absolutism within the EC. A key, if ostensibly superfluous, question is whether the term ‘culture’ includes language.⁷⁶ Various schools of thought on the definition of culture were outlined *supra*; it was shown that language was an intrinsic component of practically all variations on the concept. Moreover, in the absence of a precise definition of culture in the Treaty itself, it is possible to embrace a pragmatic approach. Documented institutional support for and involvement in language, and particularly minority language, matters further confirm its place within the Community concept of culture. Its exclusion from initial interpretations on the scope of culture has been explained as a reflection of the situation regarding legal competence rather than of the status or qualities of language itself. Moreover, the Community gradually redressed this deficit as its cultural policy evolved, referring increasingly to language concerns within the context of culture. Lane implicitly supports this conclusion where he refers to language as “...one of the most fundamental aspects of culture.”⁷⁷ Thus, language can safely be included as an aspect of EC cultural policy grounded in Article 128; any limitations relate to the implementation, rather than definitional scope, of the provision.

⁷⁴ cf. O’Toole, *supra* note 15, p. 270.

⁷⁵ cf. opening paragraphs of this Chapter.

⁷⁶ Lane, *supra* note 1, p. 953.

⁷⁷ *ibid.*, p. 954.

...while respecting their national and regional diversity...

This phrase differs from the condition in Article 126 EC (education policy) that the EC is committed to respect the 'cultural and linguistic diversity' of the Member States. Lane argues that 'cultural and linguistic diversity' may not, then, be covered by Article 128.⁷⁸ This fear is unfounded. Article 128 deals *specifically* with culture: respect for national and regional diversity must relate back directly to the subject matter of the provision. Any other construction would be erroneous. Moreover, it has been pointed out that Article 128 adopts the term 'cultures', reinforcing the notion of pluralism and diversity. The express reference to 'regional' as well as 'national' diversity provides an additional safeguard for minority cultures. This fact has been ignored by commentators who regard Article 128 as a vehicle for respecting *national* cultures and identities only.⁷⁹ Finally, it has been shown that 'culture' necessarily includes 'language': the wording of Article 128(1) might have been more comprehensive if the words 'cultural and linguistic' had been employed explicitly, but there is no reason to doubt their implication, given the context of the provision.

...and at the same time bringing the common cultural heritage to the fore.

The preservation of diversity is not an exclusive objective; it rests alongside the concurrent promotion of a collective cultural identity.⁸⁰ This is an ambiguous and controversial aspect of EC cultural policy. It reflects the link between culture and identity in a broad sense, as a proposed basis for the legitimacy of European union. In this context, Wallace refers to "...the strength or weakness of shared values tipping the scales between solidarity and disintegration...."⁸¹ The idea of common cultural heritage is based on a tenuous notion of shared history, traditions and, it is argued, a

⁷⁸ *ibid.*, p. 953.

⁷⁹ *cf.* for example, Church and Phinnemore, *supra* note 8, pp. 82 and 203.

⁸⁰ Roberts, *supra* note 9, p. 217, considers that 'common cultural heritage' goes beyond Europe and includes the common heritage of all mankind, which "...extends beyond the borders of the internal market." Rather confusingly, she goes on to deal specifically with common European heritage, without addressing its relationship to the broader concept she had introduced (pp. 221-223).

⁸¹ William Wallace, "Introduction: The dynamics of European integration", in William Wallace (ed.), *The Dynamics of European Integration*, (London; New York: Pinter, 1990), 1-24 at 16.

broadly shared sense of culture. The European Foundation was set up for the explicit purpose of "...fostering a common European identity which in turn would reinforce the political solidarity among the Member States."⁸² Lane considers that the 'Television without Frontiers' Directive, based on promoting the transmission of 'European works', was grounded in this philosophy.⁸³ The language used by proponents of a European consciousness, based on and leading to shared loyalty, reflects the implicitly mystic character of these concepts. Massart-Piérard, for example, speaks of the *destin commun* of Community citizens.⁸⁴ This is unquestionably ironic, given that such symbolism is more usually associated with nationalism, a philosophy denounced in the furtherance of European heritage and identity. Thus, the traditional bases for the legitimisation of national political structures have been modified to reflect collective rather than national identity, but this merely reinforces rather than displaces the potency of nationalist philosophy.

Howe does not accept the fundamental premise of the 'common heritage' fable, stating bluntly that "[i]n matters of ethnicity, culture and history, there is little, if anything, uniquely European, and certainly nothing as compelling as that which sustains existing national sentiment."⁸⁵ He argues that policy-makers who advance this illusion have themselves "...been equally cognisant of the futility in that approach."⁸⁶ This is certainly feasible, since it is unlikely that Member State resistance to a more elaborate cultural policy could have gone unnoticed. As a philosophical compromise, Howe advocates the promotion of a 'future-oriented' common identity, discussed in Chapter 1 *supra*. This, he argues, can transcend ethnic and historical differences, forming a more successful basis for European identity than the artificially constructed myth of a shared, past-rooted heritage. It also ties in with

⁸² De Witte, *supra* note 42, p. 277.

⁸³ Lane, *supra* note 1, p. 955; Directive 89/552, [1989] OJ L-298/23.

⁸⁴ Massart-Piérard, *supra* note 18, p. 34.

⁸⁵ Paul Howe, "A community of Europeans: The requisite underpinnings", (1995) vol. 33:1 *Journal of Common Market Studies*, 27-46 at 31.

O'Toole's idea that in order to secure awareness and acceptance of a common heritage, Member State citizens should have been accorded status as EC citizens rather than EC consumers *ab initio*.⁸⁷ Howe's thesis, as seen in Chapter 1, is not without flaws. But, in the context of European identity, it offers a reasonable alternative to the more implausible past-rooted hypotheses.⁸⁸ Cultural policy would be "...justified for its own cultural sake and not...as an instrument for promoting European identity."⁸⁹ Moreover, it accommodates the prosperity of cultural and linguistic diversity: "[i]n uniting, Europe would be able to show the world that unity and diversity are not in contrast, but constitute a dialectic polarity."⁹⁰

The gestation of common European consciousness based on collective respect for diversity can prevail far more successfully than any attempt to annihilate pluralism. Political situations throughout the world demonstrate repeatedly that, as discussed in Chapter 1, enforced assimilation has far graver consequences than sustained diversity. Commentators generally point to the stability of the Swiss Confederation to illustrate this truth. Recent constitutional developments in Switzerland confirm the fundamental importance of accommodating diversity. In 1996, the Romansch language was recognised constitutionally as an official language for communications between the Confederation and Romansch citizens; it had been a national language of the Confederation, but did not have official status. Furthermore, the Constitutional amendment included express support for measures taken by the Cantons to safeguard and promote Romansch and Italian. Thus, the accommodation of diversity remains a constitutional priority in what is generally considered to be a successful federal union. A rich variety of cultures, including languages, is what is truly 'common' to

⁸⁶ *ibid.*

⁸⁷ O'Toole, *supra* note 15, p. 276.

⁸⁸ Howe refers to the tenuous idea put forward by Anthony Smith, that a 'common cultural heritage' could be built on the fact that most languages spoken in the Member States belong to the Indo-European language family: *supra* note 85, p. 31.

⁸⁹ De Witte, *supra* note 39, p. 138.

⁹⁰ H. Brugmans, "Five starting-points" in Rijksbaron *et al* (eds.), *supra* note 39, 15-16 at 16.

the heritage of Europe. Thus, cultural or linguistic homogeneity is neither desired by the Community nor required by Article 128(1).

C. Article 128(2)

Action by the Community...

The word 'action' confirms a functional role for the EC in cultural matters, perhaps even more so than the reference to a Community 'contribution' in Article 128(1). But the spheres in which the Community may actually take action are more limited than the general objectives outlined in Article 128(1), and are examined *infra*.

...shall be aimed at encouraging co-operation between Member States...

Lane describes the Community as a 'catalyst', propelling the Member States towards the adoption of a 'Community orientation' in cultural matters.⁹¹ He argues that this is precisely what the Community has been doing since the inception of its involvement in cultural affairs. But this interpretation does not appreciate fully the significance of having past practice codified in the EC Treaty. However unwelcome Community 'interference' may have seemed to the Member States, the encouragement of cultural co-operation is now a fully legitimate Treaty objective, which can no longer be challenged on grounds of lack of competence. Moreover, the possibility that Member State co-operation may be, in fact, required by the principle of necessity, has been highlighted in Chapter 3.

The involvement and commitment of the Member States will prove crucial to the implementation of cultural policy, given the structure of Article 128 and the application of subsidiarity. It is hoped, however, that the Community will adopt an appropriately proactive approach. Otherwise, the already vast powers of the Member States in this domain will nullify the concessions made at Maastricht towards the acceptance of a role for the Community. It has been suggested that the Member States "...are more committed to some aspects of Community activity in the field of culture - for example, audio-visual services - than they are to others, such as the book

sector.”⁹² Language is an inherent element of both examples given, demonstrating once again its pervasiveness across the broad spectrum of the cultural domain. Member State support for what could be considered more practical manifestations of culture is highlighted by the examples listed. This support could have a positive impact on language policies, given that everyday, and particularly technological, applications of language confirm its significance as a ‘living language’ in a manner not exhibited by artistic and literary works. However, it is also arguable that, more cynically but perhaps realistically, the examples given stress the underlying economic concerns of the Member States, on the premise that audio-visual products contribute far more to the economy than books. Conversely, then, the role of the Community may be especially meaningful if it succeeds in steering Member State attention towards the more neglected aspects of cultural policy. In any event, it is clear that where the Community exercises its role as external co-ordinator, it can provide a necessary balance against Member State interests.

...and, if necessary...

This proviso is seen by Loman *et al* as a “...specific reminder of...the subsidiarity principle.”⁹³ It has been shown that Article 3b(2) EC, analysed in Chapter 3 *supra*, was clearly intended to apply to areas of shared Community/yMember State competence. This section introduces the practical application of subsidiarity to the specific domain of cultural policy, as envisaged by Article 128 EC. Article 3b(2) does not create competence; it regulates the *exercise* of competence for Community objectives already outlined in other provisions of the EC Treaty. What is at issue here, then, is the determination of the appropriate actor for the implementation of cultural policy, by reference to the principle of subsidiarity. As highlighted in Chapter 1, the effects of Community law cannot be boxed neatly into separate categories. In a dynamic entity, measures taken in one policy area necessarily impact on seemingly unrelated issues. If, for example, measures related to the creation of the

⁹¹ Lane, *supra* note 1, p. 951.

⁹² McMahon, *supra* note 6, p. 164.

⁹³ Loman *et al*, *supra* note 2, p. 195.

single market are within exclusive Community competence, are related aspects of cultural policy beyond the scope of Article 3b(2)?⁹⁴ Moreover, Article 128(4) states expressly that the Community is required to take cultural aspects into account in its action under other Treaty provisions. Thus, cultural policy is broader than Article 128 and the application of subsidiarity is more complicated as a result.

Everling argues that subsidiarity is reinforced by Article F(1) TEU (respect for national identity), in that "...a sphere is left to the Member States and, in so far as foreseen in their constitutions, also to their component states and regions, to legislate for their own affairs in accordance with their actual traditions and social characteristics."⁹⁵ He concludes that the delimitation of Community competence in education and culture is a specific example of this philosophy. But this interpretation does not take into account the rights of sub-national groups that are not contained within officially delimited regions or, more acutely, regions that do not have administrative power within the state system; as noted by Temple Lang, "...Article 3b does nothing to encourage devolution within Member States, and unfortunately it is likely to be used by national governments to prevent the Community from encouraging regional developments even across frontiers."⁹⁶ In the context of minority languages, for example, regional initiatives are often completely dependent on legal sanction at the national level. Furthermore, only a meagre number of EC Member States have signed the Council of Europe's European Charter for Regional or Minority Languages (1993), discussed in Chapter 5, despite the minimalist guarantees for speakers and rudimental state obligations contained therein. But despite the reservations of Member States, primarily related to sovereignty, and notwithstanding legitimate concerns over Community intrusion into what are seen as inherently national or regional matters, cultural policy is now a Treaty-based EC

⁹⁴ cf. AG Toth, "The principle of subsidiarity in the Maastricht Treaty", (1992) vol. 29:6 *Common Market Law Review*, 1079-1105 at 1093-5.

⁹⁵ Ulrich Everling, "Reflections on the structure of the European Union", (1992) vol. 29:6 *Common Market Law Review*, 1053-1077 at 1071.

⁹⁶ John Temple Lang, "What powers should the European Community have?", (1995) vol. 1:1, *European Public Law*, 97-116 at 105.

objective. Subsidiarity cannot reverse this truth. Language may be a politically sensitive issue, but it is also a cultural, sociological and economic one. EC policies affect all of these domains and, consequently, they affect language. Individual state language policies are not sufficient to check the sway of European integration. Member States who insist that only national policy measures should be entertained claim that to permit otherwise would constitute a threat to national identity. But two basic facts are being ignored. First, national identity is subject to a far greater threat by *not* adopting European measures to deal with the European dimension of language displacement. Second, focusing on *national* identity can operate to the detriment of minority cultures, and in particular to the rights of speakers of minority languages. It was noted in Chapter 1 that minority language speakers generally place tremendous faith in the capacity of the EC to achieve at the transnational level what cannot be achieved domestically.⁹⁷

A feature of the new EC competences is that any action which may be taken by the Community is set out in exceptionally restrictive detail. The harmonisation of the laws and regulations of Member States is explicitly prohibited. The role of the Community is based on encouraging co-operation between Member States, adopting incentive measures and recommendations, and developing minimum standards only where absolutely necessary. Essentially, Community policy is visualised as supplementary, which creates a significant bias in favour of national action in the context of subsidiarity. Everling observes that while cultural policy might be pursued at EC level, cultural *politics* remain within the domain of the Member States.⁹⁸ It is arguable that the constraints placed on Community initiative by Article 128 render it ineffective and entirely dependent on the goodwill of the national representatives at the Council. But what is often overlooked is the *value* of adopting a minimum

⁹⁷ cf. Jo Steiner, "Subsidiarity under the Maastricht Treaty", in David O'Keefe and Patrick M. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, (London: Chancery, 1995), 49-64 at 61, who attributes inertia at the domestic level to a lack of political will on the part of national governments. As a cautionary qualification, she argues that "...however desirable Community objectives may be, they, like national objectives, can change over time. The individual's capacity to influence policy...is still greater at the level of the state."

⁹⁸ Everling. *supra* note 95, p. 1068.

standards approach: “[i]n casting aside total harmonisation as a model, which cannot reflect the diversity of interests in the modern Community, one is welcoming flexibility and innovation and enshrining greater sensitivity to national preferences.”⁹⁹ Developing minimum standards ensures that policies can be introduced to deal with areas that might not otherwise have been addressed, while the inclusion of a non-preemption clause in directives allows Member States to adopt stricter rules than the minimum standards set at EC level. Moreover, in accordance with the principle of proportionality, the Edinburgh Summit Document calls for a more general adoption of minimum standards across the range of Community activity.¹⁰⁰ This concept is further discussed in the context of Article 128(5) but it is erroneous to conclude that the new Treaty competences have been specifically afflicted with an impediment to their realisation in isolation from all other EC objectives. Viewed from this perspective, Toth’s pessimism seems misdirected where he questions whether the new competences have been worth the ‘price’ paid, *i.e.* the codification of subsidiarity.¹⁰¹ His remarks in a subsequent publication illustrate the real danger in this context *i.e.* constraining the potential of EC cultural policy by the misappropriation of Article 3b(2): “[r]egulating matters to Member State action where Community action is required has serious constitutional implications for the division of the exercise of competences and is just as contrary to the principle of subsidiarity as taking Community action where the Member States should act.”¹⁰² It has been argued that, in the context Article 128(1), the role of the Community as co-ordinator does not necessarily imply that it must relinquish all powers of initiative. Similarly, the restraints put in place by Articles 128(2) and 3(b) EC do not preclude Community action automatically or in all circumstances. The substantive application

⁹⁹ Weatherill, “Beyond preemption? Shared competence and constitutional change in the European Community”, in O’Keefe and Twomey (eds.), *supra* note 97, 13-33 at 22.

¹⁰⁰ European Council, *Conclusions of the Presidency*, (Edinburgh Summit, December 1992), (hereafter ‘Edinburgh Conclusions’), Annex 1, Part A, Bull.EC 12-1992, pp. 8-9.

¹⁰¹ Toth, *supra* note 94, p. 1094.

¹⁰² Toth, “Is subsidiarity justiciable?”, (1994) 19 *European Law Review*, 268-285 at 275.

of subsidiarity to Article 128 is undertaken *infra*, after consideration of the remaining subsections of the provision.

...supporting and supplementing their action...

The remarks made *supra* in respect of the Community encouraging co-operation among Member States apply equally to this subsection. But the word 'supplementing' introduces expressly the proactive role envisaged for the Community in the cultural domain, potentially going beyond what has been achieved by Member State action. This is arguably dependent on the existence of a Member State initiative in the first place ('...supplementing *their* action...'). But once again, this reading of Article 128 would render the provision wholly impotent, removing the need for any Community input in the first place, and is, therefore, refuted.

...in the following areas...

- **improvement of the knowledge and dissemination of the culture and history of the European peoples;**
- **conservation and safeguarding of cultural heritage of European significance;**
- **non-commercial cultural exchanges;**
- **artistic and literary creation, including the audio-visual sector.**

This subsection has the potential to severely stunt the development of EC cultural policy. The express stipulation of areas for EC action may prevent the Community from acting on any other aspects of culture. It is for this reason that reliance on Article 128(1) without any reference to Article 128(2), as practised by many supporters of minority languages, including the European Parliament (Chapter 6 *infra*), may be an overly confident aspiration. It is particularly worrying that in Article 128(2), 'culture' is denoted in its singular form, with emphasis placed firmly on shared heritage and identity. The topics listed are extraordinarily narrow in focus. They emphasise the artistic dimension of culture, which is certainly worth protecting and promoting, but not in isolation from aspects of culture in its broader sense, such as language. Culture is categorised within the realm of exalted history rather than as a

contemporary, living force. Even if language is an element of cultural heritage, in terms of 'conservation and safeguarding', the proviso that this heritage must be of 'European significance' is open to differing interpretations. Under a narrow construction, something might only be of 'European significance' based on sheer size or pervasiveness throughout the Community. Alternatively, on a broader view, diversity of languages could itself come within the concept of 'European significance'. But this imaginative interpretation is unlikely to find favour within the narrow remit preferred by the Member States in cultural matters.

Loman *et al* do not, however, hinge the entirety of Article 128 on this subsection.¹⁰³ First, and perhaps most importantly, they cite Article 128(5), discussed *infra*, which refers to implementation of the objectives of Article 128; Loman *et al* interpret Article 128(1), not subsection (2), as containing those general objectives. It may be argued equally that *both* subsections contain distinct Community objectives. Second, they note the importance of 'mixed' cultural activities, provided for under Article 128(4) and explained *infra*. Finally, they argue that, in any event, Community action in the cultural sphere is *not* restricted to that which may be taken under Article 128: "...Article 3(p) EC in a general way states that one of the activities of the Community will be to contribute to the flowering of cultures of the Member States. There is no reason to hold that these activities are only restricted to those made possible under Article 128 EC."¹⁰⁴ Moreover, they argue that the *exclusion* of the majority of policy areas from Article 128(2), such as the media, may ensure more comprehensive action, independently of the restrictive methods of implementation outlined in Article 128(5) (discussed *infra*). In respect of the media, the audio-visual sector is mentioned explicitly in Article 128(2), in the context of artistic and literary creation; whether that term can encompass general media policy is open to interpretation by the Member States, but ultimately by the Court of Justice. Loman *et al* conclude, however, that notwithstanding the creation of Community competence in cultural matters, Article 128 has enabled the Member States "...to draw the line there, in that

¹⁰³ Loman *et al*, *supra* note 2, p. 194.

it can be seen as an attempt to block the more or less spontaneous further expansion of Community law in this area....”¹⁰⁵

Consideration of cultural policy *outside* the ambit of Article 128 merits discussion of whether or not the Community has powers in the cultural sphere under Article 235 EC.¹⁰⁶ It is arguable that culture falls outside the scope of Article 235, which is concerned with measures deemed ‘necessary in the course of the operation of the common market’. But institutional practice has not always reflected this qualification in a strictly literal sense.¹⁰⁷ Moreover, it has been shown that the domains of culture and economics cannot always be neatly dissociated. Rasmussen qualifies the potential of Article 235, noting that its use would not be possible without the attainment of consensus among the institutions and Member States on the development of Community cultural policy, a requirement not accomplished in practice.¹⁰⁸ Repudiating these arguments, Dehousse points out that whatever scope there may once have been for the employment of Article 235, it has been nullified by the codification of express competence in Article 128 itself.¹⁰⁹ But this cannot be taken for granted. Loman *et al* argue that it is, in the first instance, the inclusion of culture as a *general* objective in Article 3(p) EC which makes it possible for the Community to act in the cultural field using Article 235.¹¹⁰ If Article 128 is interpreted narrowly, it is arguable that specific powers have *not* been provided in

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*, p. 195.

¹⁰⁶ Article 235 EC provides: “[i]f action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”

¹⁰⁷ *cf.* De Witte, *supra* note 42, pp. 270-1, referring to Directive 79/409, on the protection of wild birds and endangered species.

¹⁰⁸ Rasmussen, *supra* note 54, p. 186.

¹⁰⁹ Renaud Dehousse, “Community competences: Are there limits to growth?” in Renaud Dehousse (ed.), *Europe After Maastricht: An Ever Closer Union?* (München: Law Books in Europe, 1994), 103-125 at 106.

¹¹⁰ Loman *et al*, *supra* note 2, p. 191 *et seq.*

respect of a number of aspects of culture. But in direct contradiction to Dehousse, they further assert that “[i]t is not necessary that these objectives are the general objectives of [Articles 2 and 3 EC]; they may also be the specific objectives of [Article 128].”¹¹¹ This fairly complex construction widens the scope of Article 128 considerably, but Article 235 can only come into play where there is an economic dimension to cultural policy. In such instances, it could conceivably lead to the evasion of the non-harmonisation proviso in Article 128(5) for mixed cultural/economic activities but this will depend on the Community’s interpretation of mixed undertakings. Overall, it is submitted that the Article 235 question is a moot point. It is unlikely that the Commission will resort to that provision to circumvent the intransigence of the Member States, or indeed, of Article 128(5) itself. Furthermore, any actions taken under Article 235 still require a unanimous Council decision. The Community did take action on mixed cultural/economic issues prior to the adoption of the Maastricht Treaty but without relying on Article 235 EEC. The general provisions of Community law were simply applied to the cultural sector and this practice is likely to continue, particularly in light of the policy integration clause in Article 128(4). But it has already been seen that this method of developing a cultural policy is far from ideal. In any event, Community law as it stood prior to the Maastricht Treaty remains unaffected (Article M TEU). Thus, existing developments in the cultural sphere, above and beyond those contained in Article 128(2), remain valid. Moreover, even in the development of new cultural initiatives, the Member States remain bound by the general principle of non-discrimination. This may have particular significance for language rights in the context of fundamental rights and citizenship, explored in Chapter 5 *infra*.

Article 128(2) is a remarkably disappointing provision, yet one which has attracted scant attention from those who are satisfied to laud Article 128(1) in isolation. In light of the functional origins of EC action in cultural matters, Article 128(2) is a firm slap on the wrists for the institutions. The Community is restricted to encouraging Member State co-operation by the first phrase of Article 128(2). It may

only go further than this - 'supplementing' Member State action - in the areas listed expressly and, in addition, in accordance with the principle of subsidiarity. The ultimate fate of Community initiatives is then dependent on the disposition of the Member States, acting through the Council. Given the independent commitment to subsidiarity in Article 3b(2), which ensured Member State input in any event, the prohibitive nature of Article 128(2) demonstrates further the depth of insecurity and scepticism among the Member States. Neither Article 128(1) nor Article F TEU were seen as sufficient guarantees against the anticipated evolution of the detested 'Euroculture'. But more intense Community action in the cultural sphere may not have been harmful to cultural interests *per se* but would have shown up and tackled the more undemocratic policies practised by some of the Member States, such as the non-recognition, direct or indirect, of indigenous minority languages. The general Community objective of contributing to cultural pluralism, set out in Article 128(1), must, therefore, remain an independent purpose, as justified *supra*. Otherwise, Article 128 could amount to nothing more than a waste of space in the EC Treaty.

D. Article 128(3)

The Community and the Member States shall foster co-operation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

This subsection reflects the trend of evolved practice, especially in relation to the jurisdiction of the Council of Europe. The succession of Commission publications dealing with culture all accorded precedence to the Council of Europe in the cultural domain. Loman *et al* point out that Article 128(3), when read with Article 128(5), does not confer a general power on the EC to enter into treaties with third countries or international organisations, based on the limited range of legal instruments available to the Community for the implementation of cultural policy.¹¹² Since this would render Article 128(3) virtually meaningless, however, they modify their interpretation to suggest that "...although the Community does not possess an

¹¹¹ *ibid.*, p. 191 (footnote 32).

¹¹² *ibid.*, p. 199

autonomous power in this regard, it will be able to conclude treaties in order to achieve the limited set of objectives listed in Article 128(2) EC in co-operation with the Member States.”¹¹³ McMahon argues that Article 128(3) reveals yet another facet of the Community’s yielding to other international actors in the context of cultural policy.¹¹⁴ He concludes that this will restrain Community participation to the more symbolic, prestige-gaining cultural projects than to programmes of substance. In this way, Community action is peripheral not only to that taken by the Member States, but also to the accomplishments of other international organisations and, particularly, of the Council of Europe. This submission merits consideration of the capacity of the Council of Europe to develop an effective cultural policy where the EC cannot. This question is considered in more depth in Chapter 5 *infra*, but it may be noted at this stage that cultural policy is included explicitly in the Council’s range of activities.¹¹⁵ Some commentators agree that the Council of Europe is the more appropriate forum for the development of cultural policy.¹¹⁶ It would be a mistake, however, to become overly optimistic about its potential in this arena. De Witte writes as follows about the Council’s attempts in the related province of education:

The Council’s role in education has already been marginalised. The results achieved in a few years within the European Community, on matters like the recognition of diplomas, the equal treatment of foreign nationals, the mobility of students and teachers, and international exchange programmes, are more impressive than anything that has happened in thirty years of the Council of Europe.¹¹⁷

These observations do not inspire confidence in the Council’s ability to tackle the even more politically sensitive issue of culture, a viewpoint reinforced by reference to some of the Council’s dealings with minority language rights. The decision of the European Court of Human Rights in the *Belgian Linguistics Case* has been well

¹¹³ *ibid.*

¹¹⁴ McMahon, *supra* note 6, p. 174.

¹¹⁵ *cf.* Article 1(b) of its Statute.

¹¹⁶ *cf.*, for example, Ferdinando Albanese, “Ethnic and linguistic minorities in Europe”, (1991) 11 *Yearbook of European Law*, 313-338 at 331 *et seq.*

¹¹⁷ De Witte, “Cultural linkages” in Wallace (ed.), *supra* note 81, 192-210 at 203.

documented due to the restrictive scope of the judgment delivered.¹¹⁸ The Council's European Charter for Regional or Minority Languages has granted a potentially ineffectual degree of discretion to the state signatories regarding options for implementation; notwithstanding the insubstantial obligations imposed therein, few EC Member States have proceeded to sign the Charter.¹¹⁹ The respective contributions made by both the Council and the EC are determined in more detail in Chapter 5; but it is already far from self-evident that the EC should defer to the Council of Europe in all matters cultural.

E. Article 128(4)

The Community and the Member States shall take cultural aspects into account in its action under other provisions of this Treaty.

Policy areas can rarely be completely divorced from one another. It is fundamentally important to recognise, as Article 128(4) has, that seemingly non-related measures can have an impact on the cultural sector. Indeed, it is awareness of this fact that originally led to tentative Community action in the cultural domain. To provide formally for this truth demonstrates both maturity and pragmatism on the part of the Community institutions. Article 128(4) confirms that EC cultural policy is broader than Article 128. It may also be interpreted, of course, as yet another safeguard for the interests of the Member States, but whatever the impetus behind its inception, it represents the stimulus through which institutional sensitivity to the impact of Community law on culture must be heightened. Lane, referring to Article 128(4) as an 'integration clause', identifies the key question as "...how far the Court of Justice will be prepared to limit the requirements of the internal market in the interests of culture, however defined."¹²⁰ He urges caution, stressing the relative inexperience of both the Court and the political institutions in dealing with this complex,

¹¹⁸ *Belgian Linguistics Case*, [European Court of Human Rights], Series A, No. 6, 23 July 1968, 1 EHRR 252; cf. Niamh Nic Shuibhne, "The impact of European law on linguistic diversity", (1996) vol. 5:1 *Irish Journal of European Law*, 62-80 at 65-66.

¹¹⁹ Nic Shuibhne, *ibid.*, pp. 66-68.

¹²⁰ Lane, *supra* note 1, p. 956.

predominantly national, policy area, and highlighting the dangers of succumbing to ideological rather than economic analysis. This argument is similar to those advanced in Chapter 3 *supra*, in the context of the Court's (in)ability to interpret the principle of subsidiarity. While they are certainly valid concerns, Lane underestimates the capacity of the Court to deal with its new mandate, with which it has arguably been dealing on a non-Treaty basis for some time, as in the *Groener* decision, for example. Lane suggests that Article 128(4) is unlikely to be 'overly burdensome', citing the relative ineffectiveness of a similar clause already operative in the field of environmental law (Article 130r(2) EC).¹²¹ Loman *et al* distinguish the two clauses: they read Article 130r(2) in conjunction with Article 100a(3), arguing that the requirement therein of striving for a 'high level' of environmental protection weakens the overall effect of the environmental policy integration clause.¹²² Furthermore, Article 130r(2) refers to 'other Community policies', but Article 128(4) cites 'other Treaty provisions': whether this distinction has any intended practical effect will depend on its subsequent interpretation by the Court of Justice.

Loman *et al* anticipate that Article 128(4) could have particular effect in the linguistic domain, arguing that the provision "...does make it impossible to bypass or dismiss 'cultural interests', such as pluralism...or the protection of the smaller languages."¹²³ Yet the danger that the institutions may side-step Article 128(4) is a very real one. The role of both the Committee of Regions and European Parliament, as conceived in Article 128(5), may be particularly relevant in this context. A similar mechanism to that outlined in Article 128(4) has been proposed in respect of administrative practice in Ireland: a political party policy document recommended that, in order to implement more fully the constitutional status of the Irish language as first official language of the State, a committee should be established to examine

¹²¹ *ibid.*, p. 957; the provision itself states, *inter alia*, that "[e]nvironmental protection requirements must be integrated into the definition and implementation of other Community policies." A policy integration clause was not, however, included in the new EC Treaty Titles on public health, consumer protection or education.

¹²² Loman *et al*, *supra* note 2, p. 196.

¹²³ *ibid.*

all proposed legislation.¹²⁴ The impact of the legislation on Irish language issues, or indeed, the failure of the legislature to identify a potential impact, would then be raised by the committee, who could also suggest appropriate amendments. This procedure ensures assessment by an objective, external body, not actually immersed in the enactment of the substantive elements of the legislation. This, in turn, means that the committee would be more attuned to the language dimension, and would thus identify potential concerns more readily. A similar model of implementation for Article 128(4), involving the Committee of Regions or European Parliament, or both, could be highly effective in the Community context and could secure an operative rather than token execution of the provision. Raising the cultural agenda at the outset, before the enactment of legislation, may prove particularly useful, given doubts raised over the ultimate justiciability of this subsection.¹²⁵ Given the clear wording of Article 128(4), however, the institutions appear to be under a legal, justiciable duty to take cultural considerations into account when legislating on any Treaty provision. Article 128(4) does not mention any institution(s) specifically, but refers broadly to 'the Community'; this supports the involvement of both the European Parliament and the Committee of the Regions. Furthermore, Article 198c EC stipulates generally that the Committee may be consulted where either the Council or the Commission deems it to be appropriate, over and above the specific Treaty provisions that require consultation.

F. Article 128(5)

In order to contribute to the achievement of the objectives referred to in this Article...

As argued *supra*, this phrase refers to the broad objective of contributing to the flowering of the cultures of the Member States, as set out in Article 128(1), as well as to the specific objectives listed in Article 128(2).

¹²⁴ Labour Party (Ireland), *Our Story: Ár dTeanga*, (Policy Document: Dublin, 1993), p. 19 para. (d).

¹²⁵ Lane, *supra* note 1, p. 979; Georges Sp. Karydis, "Le juge communautaire et la préservation de l'identité culturelle nationale", *IIIèmes Journées d'Études Jean Monnet*, 1-11 at 9 (footnote 39).

...the Council - acting in accordance with the procedure referred to in Article 189b and after consulting with the Committee of the Regions...

Article 189b EC establishes the conciliation procedure, whereby the European Parliament must approve the Council's common position before a proposed measure may be adopted. In light of its established commitment to the promotion of minority languages, the involvement of the European Parliament could be significant. Article 128(5) goes on to require, however, that the Council must act unanimously in respect of the Article 189b procedure. Curtin regards this as a 'highly anomalous' exception to the co-decision procedure, given the narrow legislative scope of Article 128 in the first place.¹²⁶ The requirement of unanimity in the Council could negate the likely ambitions of the Parliament, especially in the context of minorities (discussed further *infra*); but recognition of a role for the Committee of the Regions confirms the Community's support for regional, as well as national, diversity. As already submitted, an additional and meaningful way for the Committee to fulfil its role would be for it to participate in the implementation of Article 128(4).

...shall adopt incentive measures...

The character of incentive measures, first introduced by the TEU, is not defined in the EC Treaty. The absence of a definition may yet need to be clarified by the Court of Justice, so that the Council may know the extent of its powers under Article 128. It is more or less agreed, however, that this legislative option best reflects the Community's role as contributor to cultural policy in Article 128(1) and co-ordinator of Member State co-operation (Article 128(2)), covering, for example, the provision of financial assistance and the organisation of cultural events. Dashwood refers to the ERASMUS programme as an example of an incentive measure.¹²⁷ But he notes that "...it is now clear, as it was not before, that Member States are *under no obligation* to adapt their systems, so as to allow individuals and educational establishments to

¹²⁶ Deirdre Curtin, "The constitutional structure of the Union: A Europe of bits and pieces", (1993) vol. 30:1 *Common Market Law Review*, 17-69 at 37 (footnote 84); the requirement also applies to Article 130(i) (research and technological development).

¹²⁷ Dashwood, *supra* note 4, p. 122.

enjoy the full advantage of Community programmes.”¹²⁸ This position is difficult to reconcile with the obligation on Member States, under Article 5 EC, to implement Community objectives. Although Article 128 leaves the power of initiative largely in the hands of the Member States, and does not elaborate on any sort of implementation time-frame, it unequivocally denotes cultural policy as a Community objective. Thus, even at the level of incentive measures, the duties and obligations of the Member States under Article 5 cannot be dismissed.

...excluding any harmonisation of the laws and regulations of the Member States...

This subsection curbs the trend of past Community practice in certain aspects of the cultural domain, since a number of directives enacted in other policy areas have had implications for the cultural sector (*e.g.* directives on VAT). Furthermore, the Community has also issued directives on purely cultural issues (*e.g.* film, architecture, broadcasting).¹²⁹ Alongside the requirements of Community law, these directives contained express references to the interests of the Member States in preserving cultural diversity.¹³⁰ It was argued *supra* that the exclusion of the media from the list of objectives in Article 128(2) may allow the Community to continue with some aspects of its harmonisation programme. It was acknowledged, however, that there are also compelling arguments *against* this interpretation, since Article 128(2) does make express reference to ‘the audio-visual sector’. Moreover, the general objective of ‘contribution to culture’ in Article 128(1) would cover the media. It is, therefore, difficult to see how *any* aspects of EC cultural policy remain outside the narrow scope of Article 128(5), apart from mixed activities linked clearly to economic concerns. Thus, while Community directives implemented to date are

¹²⁸ *ibid.*

¹²⁹ *cf.* Loman *et al*, *supra* note 2, pp. 145-158.

¹³⁰ *cf.*, for example, Council Directive of 3 October 1989, on the facilitation of cross-boundary broadcasting, [1989] OJ L-298/23 (the ‘Television without Frontiers’ Directive); this Directive dealt with the transmission of ‘European works’ yet allowed the Member States, for purposes of language policy, to impose stricter rules on broadcasters within their jurisdictions where the Member States

unaffected by the Maastricht Treaty, it is not likely that similar harmonisation programmes could be enacted in the future. For this reason, Loman *et al* conclude that the most important contribution likely to be made in the future is the provision of financial assistance for cultural activities and, on this basis, they urge that appropriate funds are made available in the Community budgetary procedure.¹³¹

But while budgetary allocations are of fundamental importance to the cultural sector, they are not the most important contribution that the Community can make. And, ironically, while the intended purpose of the exclusion of harmonisation may have been a concession to Member State disquietude, it is probably the most appropriate setting in which to develop and implement a truly pluralist cultural policy. Harmonisation of legislation eliminates national measures in conflict with EC law and supplants a uniform Community regime. Given that cultural, linguistic and administrative policies differ vastly throughout the Member States, the conception and establishment of a homogenous cultural policy would be inherently misconstrued and counterproductive.¹³² EC cultural policy cannot be guided by the economic guidelines of standardisation and Europeanisation. The exclusion of harmonisation from the cultural sphere ensures that this cannot happen. It is beyond dispute that the Community can achieve pragmatic results in its role as co-ordinator of Member State policies; it was argued, for example, that the EC achieved far more in the fields of culture and education, even without direct legal basis, than the Council of Europe, which has always had an express cultural remit. It is essential, however, that the legislative limits of Article 128 are not misappropriated, which would render the provision completely ineffective. The Community must continue to apply the foresight and imagination that it has displayed habitually.

Lane summarises his concerns over a centralised cultural policy as follows:

deemed it necessary (Article 8); the decision on how far the Member States can go in this regard would, however, rest ultimately with the Court.

¹³¹ Loman *et al*, *supra* note 2, p. 197.

¹³² *cf.* Appendix I, *re:* the various Member State constitutional provisions on language policy.

The basic problem remains: culture is, and ought to be, national and sub-national specific. Protecting a common Community cultural heritage...is well and good, but the true threat to culture, felt especially keenly by the smaller Member States and nations within Member States, comes not from outside the Community but from within, from the 'Europeanisation' or homogenisation that is a necessary product of the Treaty and the internal market. And to those concerned to ensure cultural diversity *within* the Community *against* the Community, the 'entrails are not good'.¹³³

Lane raises several valid points, but could turn to Article 128 to seek solutions. First, it is certainly true that the smaller languages and cultures of the Community - whether national or sub-national - are under threat from the very dynamics of the EC itself: this was established in Chapter 1 *supra*. It is naive to assume, however, that national or sub-national authorities can redress this force on their own. 'Europeanisation' is not necessarily a product of the Treaty; it arises from the reality of accentuated cross-cultural interaction. But Article 128, by expressly excluding the possibility of harmonisation, has safeguarded cultural diversity from the very real threat identified by Lane. The policy integration clause in Article 128(4), if implemented, will go some way towards ensuring that the same may be said of other areas of Community policy, including instances where the EC seeks to extend its powers under Article 235, discussed *supra*. In the context of nations within Member States, who certainly are at risk 'especially keenly', these groups are not always represented by formal sub-national government structures and thus have a reduced or negligible say in how their cultural or linguistic present and future can be guaranteed. The Community, which has explicitly recognised regional as well as national cultures, could provide far more effective protection for such groups than has ever been offered by some Member States. It has also been shown that the concept of 'common cultural heritage' is not particularly meaningful or forceful in actuality and is unlikely to prevail over the Community's commitment to cultural pluralism and diversity.

... - acting unanimously on a proposal from the Commission, shall adopt recommendations.

¹³³ Lane, *supra* note 1, pp. 953-4.

This phrase exemplifies the dual character of Article 128. It ensures that the Community has a legislative mechanism at its disposal for the development of cultural policy but, at the same time, it secures Member State supremacy in two ways: first, recommendations are the weakest form of Community legislation and are not legally binding and, second, unanimity is required in the Council. The latter condition in particular demonstrates the intensity of Member State insecurity, given the legal weakness of recommendations.¹³⁴ As with the exclusion of harmonisation, however, the unanimity requirement may yet produce positive effects, despite its ideological background. It could, for example, constitute a protection mechanism for smaller states, whose special needs in the cultural and linguistic sectors may not have been considered adequately during the drafting process. Moreover, the 'moral' force of recommendations should not be discounted, particularly once they have been published in the wider public domain. The Commission has always been active in determining Community cultural policy and it is hoped that this initiative will continue. Commission initiatives *since* the adoption of Article 128 EC are considered in Chapter 6 *infra* but "...if the Member States do not like the initiatives taken...they have reserved ample powers to block the adoption of such measures, including the right of veto for every single Member State."¹³⁵ And while this may prove beneficial to the preservation of cultural diversity, it could also reduce any progress made by the Community to a complete stalemate. It is, therefore, particularly important that cultural and linguistic groups continue to seek the support of *all* levels of authority, regional, national and international.

De Witte has argued that "...one should...not attempt to merely *prevent* the Community from entering the [cultural] field, but also to *steer* its policy in the appropriate direction [since] both national and regional identities may sometimes better be protected by closer formal interaction at the European level than by the

¹³⁴ Dehousse writes that "[t]he coexistence within one single document of such contradictory intents should not be viewed as an inconsistency, but rather as one more reflection of the clash between the different versions of the Community's *raison d'être* that permeated negotiations at the intergovernmental conference." (Dehousse, *supra* note 109, p. 106).

¹³⁵ Loman *et al*, *supra* note 2, p. 210.

separate policies of each Member State”¹³⁶ From this perspective, co-operative participation is crucial, provided that each Member State is sincerely committed to cultural diversity and does not use its power of veto as a defence mechanism against objectively positive change. Given that some Member States deny recognition of or subsequent support for the linguistic minorities within their territories, it may take some time before any substantive progress is made. But Article 128 provides, for the first time, a platform from which the EC can grapple more openly with that task.

5. SUBSTANTIVE APPLICATION OF SUBSIDIARITY

It has always been recognised, not least by the EC itself, that implementation of Article 3b(2) EC requires the determination of vague and ambiguous criteria. In response, various guidelines that identify relevant considerations have been published. This section details some of these proposed frameworks for the substantive application of subsidiarity, anticipating their application to the development of language policies under Article 128 EC. The overriding limitations within Article 128 itself apply throughout: first, language policy is considered as an element of the general cultural policy objective in Article 128(1) since Article 128(2) has already been shown to be relatively obsolete in this context; second, the role of the Community is limited to ‘contributor’ and, finally, only incentive measures and recommendations may be enacted.

A. Early Guidelines: The Common Market Law Review

In 1990, before the adoption of the Maastricht Treaty, the editors of the *Common Market Law Review* anticipated the formal introduction of the principle of subsidiarity into Community law.¹³⁷ Their analysis was based on the traditional, ecclesiastical interpretation of subsidiarity, as well as Article 12 of the 1984 Draft Treaty on European Union and Article 130r(4) EEC. Drawing from these sources, a sequence for the application of subsidiarity was developed. The first step was the

¹³⁶ De Witte, *supra* note 116, p. 205.

determination of whether the objective in question should be dealt with by the private or public sector. In accordance with theological doctrine, it was held that 'maximum leeway' must be given to the private sphere; issues should be tackled by public authorities only where absolutely necessary. Where the need for government action was established, it was further required that the appropriate *level* of authority be resolved: local, regional or central government within the state, Community intervention where greater efficiency was at issue. If domestic action was selected, the appropriate level of internal authority would be regulated in accordance with national law only, without any Community interference. Finally, the intensity of action required was to be established. It was concluded that, in accordance with subsidiarity, any action at Community level should be minimal, leaving the "...maximum amount of room to manoeuvre to the Member States."¹³⁸

This approach is faithful to the original, ecclesiastical idea of subsidiarity. It does not assume that official action is desirable. Even where that can be established, a broad interpretation of 'official' is applied, identifying the many strands of administrative government available. From the perspective of language policy, it is likely that implementation of this approach would have been welcomed by minority language groups, since it attributes to them a degree of responsibility for their own fate. In practice, however, it has been more usual to supplant the role of national governments or the EC instead of allocating competence to subsidiary groups and regional bodies. Furthermore, action taken at regional level is usually ultimately dependent on standards set at higher levels of authority. Where a national government is hostile to minority language groups within its jurisdiction, it is unlikely to grant far-reaching powers to regional bodies. It is in this context that the Community may yet play an enabling role, establishing minimum, but effective, policy guidelines that take due account of national and sub-national diversity; the express recognition of regional as well as national cultures in Article 128(1) supports this assertion. Focusing on incentive measures of this kind also fits with the

¹³⁷ (1990) vol. 27:2 *Common Market Law Review*, 181-184.

¹³⁸ *ibid.*, p. 183.

limitations detailed in Article 128(5). But, again, it must be borne in mind that these comments were not based on Article 3b(2) EC and that the role of sub-national authorities has been of far less significance in reality.

B. Official Guidelines: The Edinburgh Summit Document

Possible difficulties with the implementation of Article 3b(2) were anticipated at the Lisbon Summit, in June 1992. The European Council called on the Commission and Council to develop suitable procedures and to report at the Edinburgh European Council Summit in December of that year. As noted in Chapter 3 *supra*, the Edinburgh Conclusions set out the basic characteristics of subsidiarity, such as its legal significance, justiciability and the role of the institutions. The idea of taking decisions 'as closely as possible to the citizens' was mentioned briefly, in conjunction with Article A TEU, but the Document focused almost exclusively on the principles contained in Article 3b EC.

Dealing specifically with Article 3b(2), it was stated that the Council must be satisfied that *both* aspects of the provision are fulfilled *i.e.* that 'the objectives of the proposed action cannot be sufficiently achieved by Member State action', and that they can *therefore* be better achieved by the Community.¹³⁹ In order to determine precisely when Community intervention is justifiable, three alternative but complementary criteria were outlined:

- the issue has transnational aspects that cannot be regulated satisfactorily by the Member States, and/or,
- Member State action alone, or the absence of Community action, would conflict with Treaty requirements or otherwise 'significantly damage' Member State interests, and/or,
- the Council is satisfied that Community action would produce clear benefits, in light of the scale or effects of the proposed action, compared to what could be accomplished by Member State action alone.

¹³⁹ Edinburgh Conclusions, *supra* note 100, Part II, pp. 6-7.

It was stipulated that the 'better achieved' test should be substantiated by qualitative and, where possible, quantitative evidence. Finally, a preference for minimum harmonisation was stressed.

It cannot be assumed that EC intervention is the automatic response to the perceived inadequacy of Member State action. Article 3b(2) stipulates situations where the Member States 'cannot' achieve the objective in question: past or present policy is not, then, a sufficient measure of their *potential* capacity to act. This in itself creates a significant presumption in favour of domestic action: to establish that a Member State can or cannot achieve an objective is far more subjective and inherently less quantifiable than assessing whether the objective has or has not been implemented successfully to date. As a result, arguments stressing a Community solution to the *Community* dimension of language shift, for example, would need to be advanced to rebut the presumption in favour of Member State action. In this context, it was established that the dynamic of European integration has affected and will continue to affect language patterns throughout the Member States; it was also argued that there is an economic as well as a moral significance to language issues. Quite apart from the implications for fundamental rights and citizenship, the practical and economic concerns underlined show that language concerns can no longer be redressed sufficiently by national action alone.

The existence of minority language groups throughout the Member States satisfies the requirement that a proposed measure must have a transnational aspect. It cannot, of course, be assumed that cross-border concerns *must* be regulated by the Community. But minority languages are rarely a priority on any domestic political agenda. The various approaches adopted by the Member States suggest that there exists a diversity of standards that cannot be surmounted in the absence of, at the very least, Community co-ordination for the establishment of acceptable minimum standards. Again, the indifference of the majority of Member States to the Council of Europe's 1993 Charter, which focused on outlining entitlements for speakers yet

ensured that ample discretion remained with the signatory states, supports this contention.

While the cross-border dimension on its own can justify EC action, it is worth considering the implications of the other criteria set out in the Document. The second test is particularly ambiguous, containing two alternative yet distinct standards. Community action is justifiable where its absence would either conflict with the requirements of the Treaty *or* significantly damage Member State interests. Limited minority language policies, based on co-ordination and co-operation, and within the legislative remit of Article 128(5), can be grounded in Article 128(1); implementation of these policies is, therefore, a Treaty requirement. An assessment of whether the absence of a Community contribution contradicts this requirement is necessarily connected with the 'sufficiently achieved by the Member States' criterion. Although both tests are presented in an and/or formulation, it is difficult to see how they can be separated, since absence of Community action contradicts a Treaty requirement only where the Member States cannot achieve the relevant objective(s). The second consideration, that of significant damage to Member State interests, is even more elusive. At face value, it seems erroneous that Community action in pursuance of an objective incorporated into the Treaty by the Member States themselves would in turn be employed to damage Member State interests. Why would the Member States sanction a Treaty objective without ever anticipating or intending that Community action could be undertaken in consequence? This scenario projects a deceptive image of the Community as an autonomous polity, entirely free of restraints, such as the stringent unanimity requirement in Article 128(5). The concept of 'significant damage' is grounded in the cautionary ideology of the principle of subsidiarity itself. Its resolution involves a subjective, political assessment which cannot be determined absolutely. A danger exists, therefore, that otherwise legitimate Community action could be dismissed on this vague and imprecise basis. This is particularly conceivable in sensitive policy spheres, such as culture and language. A palpable degree of Member State hostility exists, sometimes defensibly, towards Community intrusion into what are viewed as domestic concerns;

this is especially evident where the issues are closely linked to national identity. But Member States should not manipulate sovereignty concerns at the expense of fundamental language rights, for example. It is arguable that all linguistic concerns are domestic, that Community action in this field would significantly damage Member State interests from the perspective of national identity or using the 'closer to the citizen' criterion. The contrary view, stressing the Community dimension to language concerns, has, however, been established and projects a far more realistic view of contemporary circumstances.

The concerns raised above tie in, somewhat ironically, with the last test *i.e.* whether the Council is satisfied that Community action would produce clear benefits in consideration of scale and effects. Assessing benefits of this kind is where the application of qualitative and quantitative analysis seems most feasible. But the Council consists of Member State representatives. If a proposal is perceived to damage Member State interests, it is unlikely that the Council will be prepared to adopt it, whatever conclusions empirical analysis might produce. If one Member State or a minority of Member States have an objection to proposed measures, they lose out where qualified majority voting is practised. But in the context of Article 128, all Council decisions must be taken unanimously. This proviso should be viewed as an in-built safeguard, not as an incentive to misapply the subsidiarity tests.

The relationship between the three tests outlined is clearly an interdependent one; their application in an 'and/or' formula is misleading since the issues cannot always be addressed in isolation. By developing a sequence of questions, an impression that the application of subsidiarity is a logical, step-by-step procedure has been created. Specifying the desirability of using quantitative as well as qualitative analysis compounds this illusion. But the answers to the questions posed are more likely to be arrived at by political rather than practical reflections. Subsidiarity is not a straightforward concept, especially where it has been adopted as an ambiguous compromise between fundamentally contentious interests. Where subsidiarity is applied on a recurring basis but not within a structure of clearly delimited

competence, each and every application will have to be considered on its own facts. That is not the problem here. In reality, it is likely that very little emphasis will be placed on 'facts'. No attempt was made, for example, to define the key phrases, such as 'sufficiently achieved', 'significant damage' or 'clear benefits', or to suggest the issues that ought to be considered in these contexts. Overall, the scope for subjectivity is remarkable. As a result, the European Council conclusions have perpetuated rather than dispelled the obscurity of subsidiarity.

C. Elaboration of the EC Guidelines: Academic Commentary

In contrast to the relatively minimalist guidelines favoured by the European Council, a detailed framework for the application of subsidiarity was developed subsequently by Temple Lang.¹⁴⁰ He does not really address the relative capacity of the Member States to achieve Treaty objectives, focusing instead on an elaboration of the idea that Community action is 'better' where it:

- (1) can go further in the direction desired than national measures could go;
- (2) is more efficient or effective;
- (3) can do something which states could not achieve at all;
- (4) is a necessary basis for common policies;
- (5) provides co-ordination of otherwise uncoordinated national measures, where lack of co-ordination would be undesirable;
- (6) is needed to facilitate or make possible Community measures on some other point, or to offset the inconvenient effects of Community measures in some way (e.g. a cohesion fund is needed to offset ill effects on peripheral regions).¹⁴¹

These criteria elaborate on the meaning of 'better achieved'; some are straightforwardly obvious, such as greater efficiency or effectiveness. The requirement that Community action must be a '*necessary* basis for common policies' reinforces the idea that EC measures are not the automatic route for the implementation of Treaty objectives. In the context of culture, encouraging co-ordination to the extent anticipated here may, however, contradict the express prohibition on harmonisation in Article 128(5). In a specific sense, the absence of co-ordination is undesirable where even basic language rights are not recognised or implemented; this interpretation is discussed in Chapter 5 *infra* in the specific

¹⁴⁰ Temple Lang, *supra* note 96, pp. 110-112.

context of fundamental rights and citizenship. Co-ordination can also be interpreted broadly, as developed in the context of environmental policy, for example, where the adoption of co-ordinated basic standards meant not only that the ensuing obligations were not prohibitive from the Member State perspective, but also that national measures detailing more intensive protection were entirely permissible. Finally, the requirement that the EC must develop policies to offset the effects of Community law on peripheral regions is particularly welcome from the perspective of minority language policy.

Temple Lang proceeds to formulate eleven comprehensive questions to determine whether Community or Member State action is required. He does not attempt to evade the necessarily subjective nature of subsidiarity, stating plainly that the criteria are of a practical and political rather than legal nature. These questions are now considered individually in the context of language policy development.

(i) Is the scale of the problem so large that it needs to be tackled by the EC?

In political terms, language rights are rarely a priority, apart from situations that degenerate to militant disruption. From a national perspective, the number of speakers of a minority language can range from a limited scattering to millions. But in aggregate terms, approximately fifty million European citizens speak a language other than those officially recognised by the EC. In addition, the increasing utility of just one or two languages across Europe has accentuated government concern in respect of smaller official languages. It is arguable, therefore, that in the Community context, the preservation of minority and other languages is a 'large-scale' problem.

(ii) Is there a substantial impact on cross-border situations and policies?

No EC Member State is considered absolutely monolingual.¹⁴² Language issues do have cross-border implications. The Court of Justice has assessed language policy measures in various Member States, for example, in the context of free movement of

¹⁴¹ *ibid.*, p. 110.

workers and discrimination against non-nationals.¹⁴³ The role of the EC in foreign language teaching programmes, and in education more generally, is also relevant here, but it is conceded that this policy area may not be considered to be 'substantial' except by those involved directly in the promotion of language education.

(iii) Would differences between Member States be inherently inconsistent with the objective?

Article 128 EC provides that the Community must respect the national and regional diversity of the Member States in the context of culture. In general terms, differences between Member State policies may not only be legitimate but necessary to secure the *effective* implementation of language rights: initiatives for Gàidhlig in Scotland, for example, will hardly be comparable with those required for the Catalan language. Significantly, the application of diverse solutions is enhanced by the exclusion of harmonisation in Article 128(5). But the ideology of accepting differences between Member States could inadvertently condone the absence of a basic standard of respect for language rights in any one of them. The Treaty commitment to respect for cultural diversity could provide redress in this context but, because of the bias throughout Article 128 against far-reaching EC initiative, a reparative Community language policy might be implemented more successfully within the ambit of fundamental rights and citizenship, discussed in Chapter 5 *infra*.

(iv) How important economically is the distortion of competition, or the barrier to trade or other problem, which it is intended to eliminate? Will its importance increase or diminish?

While language issues do have an economic dimension, the impact on aggregate EC trade, in a literal sense, is negligible. But the various impacts of trade laws are far broader than those which can be denominated in monetary terms only. In any event, the existing economic dimension of language policy is certain to increase rather than diminish, in light of the accelerating spread of the languages of wider

¹⁴² cf. Alpha Connelly, "The European Convention on Human Rights and the protection of linguistic minorities", (1993) vol. 2:2 *Irish Journal of European Law* 277-293.

communication. This has two principal effects: first, an increased demand for education services in the predominant languages and second, a counter-attempt to promote all other languages, both official and non-official.

(v) What ill effects will result if no action is taken? Will the ill effects increase over time if not prevented?

To date, the Community has not taken steps to actually implement various measures in favour of minority languages proposed by the European Parliament. Recognition of the value of minority languages is freely given, but this usually stops short of considering the more substantive measures proposed. If this situation persists, the preservation of linguistic diversity will be seriously threatened. The predominance of one or two languages within the Community institutions and, increasingly, in European society more generally, has accentuated nationalist tensions within the EC power structure. This has often dissuaded Member States from approaching European issues from a European perspective, who strive instead to cultivate a separatist defence of national integrity. This has encouraged a culture of 'us and them' in the Community/Member State context, which goes absolutely against the impetus for supra-national co-operation in the first place. It is inevitable that these ill effects, left unchecked, will increase rather than diminish over time. The counterpromotion of an artificial common European identity, discussed *supra*, has had little effect in reality and has even been questioned by its proponents. Any continued or perceived promotion of assimilation will threaten the foundations of European integration in a more critical way than appreciation of diversity ever could.

(vi) Can the objective be achieved by minimum standards or by mutual recognition rather than by comprehensive rules?

(vii) Is a regulation or a directive more appropriate?

These issues relate more to the principle of proportionality but do raise important considerations for the application of subsidiarity. It is peculiar that Temple Lang refers only to regulations and directives, since most of the Treaty provisions to which

¹⁴³ e.g. Case 137/84 *Ministere Public v. Mutsch* [1985] ECR 2681; *Groener*, *supra* note 28.

subsidiarity applies do not permit the adoption of these legislative acts in the first place. Article 128(5) excludes the harmonisation of rules in the sphere of cultural policy and specifies recommendations as the appropriate act of implementation. The trend towards adopting minimum standards for non-exclusive policies more generally is, however, becoming increasingly evident. Ultimately, the Court of Justice may determine whether Article 128's guiding principles of 'co-operation' and 'contribution' can encompass the introduction of minimum standards by the EC; in the meantime, this initiative rests, in practical terms, within the discretion of the Member States, acting through the Council. As noted *supra*, the adoption of minimum standards allows more stringent measures to be sanctioned at national level. It is a system that has been readily applied to environmental protection and may yet prove advantageous for language policy, since the needs of language groups across Europe are as diverse as the languages themselves. But 'minimum standards' should never be equated with minimum effectiveness or enforcement. In the context of international protection for fundamental rights more generally, a parallel dilemma exists. Where the protection of rights varies in different countries, finding a common standard can be a politically contentious struggle; this is exacerbated when the rights in question are considered not to be as 'fundamental' as others. The debate on the implementation of economic and social rights is particularly illustrative. As a compromise, minimum standards are applied, along with an aspiration that they will be implemented gradually and in consideration of practical exigencies. It is generally maintained that settling for minimum standards ensures that rights are being protected at some level rather than not being protected at all. The most common enforcement mechanism applied is the procedure of state reporting, but its effectiveness is widely criticised, since it leaves an unacceptable level of discretion to states and does not provide independent redress for the individual.¹⁴⁴ It is unfortunately significant that, in the context of language policy, most European states are not yet prepared to accept even discretionary obligations outlined in the Council of Europe's Charter for Regional or Minority Languages. EC cultural policy

formulators cannot succumb to this apathy. Minimum standards can work, but only where accompanied by a commitment to maximum effectiveness. In view of the structure of Article 128 and the application of subsidiarity, however, this commitment must be made by the Member States themselves.

(viii) Can the objective be achieved by providing funds rather than by rule making, or by co-ordination of national policies rather than by a Community measure?

Moneys allocated to language groups can be used in numerous ways: funding co-ordinating bodies, setting up and maintaining minority language education structures, developing enterprise in associated regions, as well as encouraging and sponsoring cultural activities and exchanges through the medium of the language(s) in question. Church and Phinnemore warn that the lack of available Community funds may seriously impede any attempted progress in the formation of EC cultural policy.¹⁴⁵ But providing funds will not address issues such as the relationship between speakers of minority languages and public bodies, whether national or supra-national, or the determination and implementation of the language rights. Thus, while the provision of funds is necessary, it is not sufficient.

The second phrase is fairly elusive since it is difficult to see how national policies can be co-ordinated *without* a Community impetus. It has already been shown that the Council of Europe has not had much success in this particular undertaking. Moreover, Article 128(5) explicitly commits the EC to adopting 'incentive measures' in the cultural field. The primary advantage of Community measures is objective, external supervision for methods of implementation and enforcement.

(ix) If the aim can be achieved in several different ways, could the Community measure allow Member States to choose one of several options?

¹⁴⁴ A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights*, 3rd ed., (Manchester : Manchester University Press, 1992), pp. 41-50.

¹⁴⁵ Church and Phinnemore, *supra* note 8, p. 205.

In reality, an EC minority language policy would *only* be effective if framed in this manner, for several reasons. At present, national regimes for the protection of language rights vary considerably across the Community. But, as noted, different language groups have very different needs; attempts to achieve absolute uniformity would be entirely futile. In any event, Article 128 EC prohibits the harmonisation of national laws. From the political perspective, it is unlikely that the Member States would concede to implementing a European policy *without* having a number of choices or options but again, the danger exists that political compromises and the enjoyment of inordinate discretion could lead to ineffectiveness: this mindset cannot be allowed to prevail.

(x) Would Community measures to achieve the aim in question be an objectively reasonable *quid pro quo* for a significant number of Member States to seek in response to some other Community measures?

Decision-making in the Council is necessarily political, since the Member State representatives are considering national as well as Community interests. It is inevitable that political bargaining sometimes secures support for or rejection of proposed measures, often on a *quid pro quo* basis. It not really clear, however, why Temple Lang has drawn subsidiarity into this process; the association of subsidiarity with the political dimension of Community law to this extent is contextually misplaced and can only serve to further diminish its legitimacy in practice.

(xi) If a Community measure were adopted, should it contain provisions for the special problems of particular regions?

In the context of minority languages, this is inevitable and is expressly recognised in Article 128(1) itself. But caution must be taken not to classify language rights inherently as 'special problems', or to associate minority languages exclusively with the regions. The Irish language, for example, is spoken primarily in designated, geographically scattered regions, but is also spoken in a number of urban settings, not necessarily proximate to the *Gaeltachtaí*.

The preceding paragraphs identify specific questions that can arise when justifying Community intervention on the basis of subsidiarity. There are no exact rules or procedures; indeed, Community measures are typically framed to deal with diverse circumstances. In addition, their impact on national law varies greatly, in terms of both practical effect and political significance. Temple Lang has at least grappled with criteria that may be determining factors in the practical application of the European Council guidelines. It is patently obvious that subsidiarity is an obscure and subjective concept, capable of manipulation by both the Community and the Member States. Its denomination as a political weapon has potentially serious consequences for acutely sensitive policy areas, including culture and language. It is conceivable that subsidiarity could thwart the implementation of basic language rights, such as those envisaged by the European Parliament. But it is not acceptable that an indeterminate allusion to its sweeping omnipotence be deemed sufficient to abandon this objective, discussed further in Chapter 6 *infra*. Restrictions and difficulties have been identified, but clear possibilities for Community action in the cultural, and especially linguistic, sector, have also been shown to conform with both the express limitations of Article 128 and the application of the principle of subsidiarity: the role of the Community in minority language issues can be justified by at least eight of the preceding eleven questions.

6. CONCLUSION

Article 128 EC reflects the ideological cross-roads reached at the Maastricht negotiations and confers mixed blessings on the Community institutions. Article 128(2) is a limited provision that does not encompass the development of language policy. In respect of the sectors listed expressly, it is unlikely that past harmonisation programmes can be further developed but measures enacted prior to ratification of the TEU are unaffected. Article 128(1) contains an independent objective, committing the Community to contributing to cultural diversity in general terms. The concurrent obligation to promote common European heritage can be interpreted in a broader context and does not conflict with the ambition of safeguarding cultural

pluralism. Language policy, including minority language concerns, falls within the ambit of Article 128(1). There are, however, limitations to be considered: the Community may 'contribute' to the 'flowering of cultures' but only through enacting incentive measures and recommendations, the latter requiring a unanimous Council decision. Notwithstanding the ideological background, the employment of these legislative instruments is fortuitous, in that it provides a platform for sanctioning programmes concentrated on the maintenance of pluralism. In light of the diversity of cultures and languages throughout the Community, harmonisation would have been unacceptable. Significantly, and in contradiction to the stance adopted by some of the institutions, the principle of subsidiarity does not necessarily introduce additional constraints; EC language policy initiatives can sometimes be required as a result of rather than in contradiction to Article 3b(2) EC. The role of international organisations, particularly the Council of Europe, is unlikely to develop policies that surpass those already implemented by the Community. This can be explained largely by Member State apathy, even antipathy, illustrated by the poor response to the Council's Charter for Regional or Minority Languages. The policy integration clause in Article 128(4) may influence the evolution of Community law more generally, but only if draft legislative measures are examined deliberately from this perspective, preferably by the European Parliament or the Committee of the Regions. It was also noted that cultural policy is not confined within the dimensions of Article 128 where there are significant economic considerations; it is unlikely that Article 235 will be employed successfully in this context, however, since the Community has traditionally dealt with mixed activities by applying the fundamental principles of Treaty-based EC law.

Exercise of the inordinate discretion accorded to the Member States is what will yet determine the effectiveness of Article 128. It is hoped that legitimate national sovereignty concerns will not impede the implementation of a democratic language policy, both within the Community and throughout the Member States themselves; but more particularly, obstinacy should not masquerade as the defence of sovereignty against unwanted, though justifiable, centralisation. The application of subsidiarity

and the limitations contained in Article 128(5), bolstered by Article F(1) TEU, provide more than adequate protection against genuinely intrusive Community action.

The moral force of Community incentives should not be discounted. The Resolutions on minority languages, published by the European Parliament in the 1980s and early 1990s, for example, were not legally binding, but they did generate considerable awareness of the democratic deficit pertaining to non-recognition and non-implementation of language rights. Building on this awareness in a direct way is not really possible under Article 128 without a fundamental shift in Member State attitudes towards linguistic minorities. Significant but relatively benign measures, such as the provision of financial aid for language programmes, are wholly justifiable under Article 128 but the provision is a prime example of giving with one hand yet taking away with the other. Its adoption is an inherently beneficial progression but it is unlikely to support the modification of deficient national measures towards more effective standards. It is for this reason that language policy is further considered within the context of fundamental rights and citizenship, in Chapter 5 *infra*.

CHAPTER 5
LANGUAGE RIGHTS AS FUNDAMENTAL RIGHTS IN THE EC
CONTEXT

1. INTRODUCTION

The evolution of a fundamental rights jurisdiction in the European Union is a controversial cornerstone in the evolution of the Union itself, permeating debates on democracy, legitimacy and citizenship. But the nature and scope of this jurisdiction are uncertain. In the context of language rights, this chapter analyses the existing and potential roles of the Community in the fundamental rights domain, not only from the traditional perspective of political astuteness but concentrating on the individual as beneficiary throughout the Member States. It is first established that language rights can be legitimately categorised as 'fundamental' rights.

2. LANGUAGE RIGHTS AS FUNDAMENTAL RIGHTS

Writing in the Canadian context, Réaume comments that "[l]anguage policy making has for too long been conducted solely as an aspect of power politics. The result has been a singular inattention to the development of a principled theoretical grounding as an important aspect of human rights."¹ The underlying question is whether a right to use a particular language, for either official or non-official purposes, is a fundamental human right, as opposed to an administrative or legal claim. In addition, even if language rights are accepted as fundamental rights, does a negative rights approach, *e.g.* non-discrimination clauses, provide adequate protection or is the creation and implementation of a positive linguistic choice regime also necessary?

¹ Denise G. Réaume, "The constitutional protection of language: Survival or security?", in David Schneiderman (ed.), *Language and the State: The Law and Politics of Identity*, (Quebec: Les Éditions Yvon Blais, 1989), 37-57 at 57.

Classification of language rights as fundamental rights hinges on whether or not the term 'fundamental' can encompass degrees of rights *i.e.* that some rights are, legitimately, more fundamental than others. This construct allows for a priority of rights, from abolishing the death penalty to securing due process, to the enjoyment of social and cultural rights. Fundamental rights theories do not, and should not, presuppose that all rights are inherently equal in priority. But this does not mean that norms of lower priority do not actually constitute rights in themselves. Rights of all degrees evolve from the common aims of the eradication of suppression and the achievement of justice. In this context, Skutnabb-Kangas and Phillipson note that "[o]ften individuals and groups are treated unjustly and suppressed by means of language."² They identify, therefore, the need to "...formulate, codify and implement minimal standards for the enjoyment of linguistic human rights [as] an integral part of international and national law."³

A. Historical Background to the Protection of Language Rights

Contemporary human rights law, which envisages participating states surrendering a degree of national sovereignty, stands in marked contrast to the original inter-state system. Significantly, language rights, in the context of minority rights more generally, constitute one of the three sources of international human rights law, along with humanitarian intervention and the abolition of slavery.⁴ Protection of minority rights derived initially from tolerance of religious diversity, followed by the granting of rights to religious freedom. These principles were expanded to include other minority concerns, such as national origin. Throughout the nineteenth century, however, very few countries gave legislative consideration to the protection of minorities within their territories.⁵ A number of inter-state treaties on minority

² Tove Skutnabb-Kangas and Robert Phillipson, "Introduction", in Skutnabb-Kangas and Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination*, (Berlin; New York: Mouton de Gruyter, 1994), 1-22 at 2.

³ *ibid.*

⁴ cf. A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights*, 3rd ed., (Manchester: Manchester University Press, 1992), p.19.

protection were concluded at this time, primarily in an effort to quell potentially unsettling nationalism among minority groups and based on fears of secession. But the treaty system is generally considered to have been unsatisfactory, the resulting discontent and strife leading to "...the shot at Sarajevo which helped launch World War I..."⁶

The redrawing of national boundaries after the First World War meant that national minorities were often displaced on the 'wrong' side of the new state frontiers. This was of considerable importance at both domestic and international levels, not because of a desire to develop tenets of human rights law, but because of the need to establish and maintain political stability. A more elaborate inter-state treaty system was devised, under the supervision of the League of Nations, whereby states undertook to ensure that members of ethnic, religious or linguistic minorities enjoyed civil and political rights on an equal footing with the rest of the population. But the demise of the League itself necessarily resulted in the demise of the minorities treaties. It is generally acknowledged that the system was not a satisfactory one in practice, but a number of striking theoretical innovations remain acutely relevant to the contemporary protection of fundamental rights generally and to language rights in particular. The Permanent Court of International Justice issued a number of advisory opinions on minority rights, stressing that equality in law was futile without a commitment on the part of state authorities to the realisation of equality in fact.⁷ In the context of language rights, it was intended that the right to speak a particular language should be enforced irrespective of whether or not an individual understood the official language of the state, with any related costs borne by the state. Ó Riagáin and Nic Shuibhne point out that "...subsequent international instruments, such as the European Convention on Human Rights, limit the introduction of an interpreter in

⁵ Capotorti, as Special Rapporteur for the United Nations, notes that some countries - Austria, Switzerland, Hungary and Belgium - made some provision for minorities, particularly in respect of the official use of languages: cf. Francesco Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (hereafter 'Capotorti Report'), (New York: United Nations, 1979), p. 3, para. 18.

⁶ J.A. Sigler, *Minority Rights: A Comparative Analysis*, (Connecticut: Greenwood Press, 1983), p. 72.

⁷ cf. in particular, the *Minority Schools in Albania Case*, (1935) [PCIJ] Ser. A/B, No. 64.

criminal proceedings, for example, to situations where the accused does not understand the language of the proceedings.”⁸ Thus, the protection of language rights was relegated to lower priority on the human rights agenda with the passage of time, in contrast to its original significance in the formation of the principle that a state’s treatment of its nationals was no longer a strictly domestic matter.

Ironically, this change in attitude towards minority rights can be linked to the foundation of the United Nations and the Council of Europe. In the aftermath of the Second World War, the international community was determined to ensure that recently witnessed human rights atrocities would never happen again. In accordance with the dignity and equality of all human beings, human rights protection was generalised and universalised. This meant that special protection for minority groups was no longer a priority. Consequentially, as discussed *infra*, neither universal nor regional human rights instruments drafted at this time contain provisions that deal expressly with minority rights. Another difference is that the League of Nations sought to contribute to political stability by according rights to displaced minority groups, but thinking at the time of the foundation of the UN considered minority rights themselves as a threat to national unity and, therefore, to economic and political stability. In recent years, the grim reality of the international community’s neglect of minority rights has manifested itself in the violent breakdown of multiethnic states, forcing minority issues back on the international political agenda. As stressed in Chapter 1, extreme minority-based conflicts represent the most publicised but least common minority situations and usually result from denial rather than implementation of minority rights. Language rights represent the lower end of the minority rights spectrum, in contrast to the violence and persecution sometimes associated with other minority claims. But this does not displace their legitimacy in the domain of the realisation of justice. To examine the role of the EC in the protection of language rights, it is first necessary to establish a theoretical framework

⁸ Pádraig Ó Riagáin and Niamh Nic Shuibhne, “Minority language rights”, (1997) 17 *Annual Review of Applied Linguistics*, 11-29 at 16.

within which claims based on language choice can be justifiably termed *fundamental* rights.

B. Contemporary Theories on Language Rights as Fundamental Rights

The following sections clarify the scope of language rights in the context of this thesis and introduce incidental terminology. As stated in Chapter 1 *supra*, this study is confined to the official use of language, which relates to choice of language for administrative purposes, for the business of government, whether dealing with a state or with an entity such as the EC. It includes choice of language in the courts and communications with state authorities or EC institutions. As explained in Chapter 1, however, examination of this domain of language use necessitates consideration of the broader environment of language behaviour and policy, which incorporates social, cultural, political and economic planning and development. Ó Riagáin and Nic Shuibhne note that “[c]onceptually, the question of minority language rights can be located within the classic debates about the balancing of liberal freedom with the demands of a capitalist economy, of equity and efficiency.”⁹

(i) Definitions and Terminology

There is no universally recognised definition of a ‘minority’ in human rights theory.¹⁰ A number of criteria of assessment, both objective and subjective, are usually applied, however, in any attempt to define a minority group. Objective criteria include the existence of a distinct group, its relative numerical constitution and the existence of a non-dominant position (usually referring to a political context). On the other hand, subjective criteria deal with the group’s self-perception as a minority, based on concepts like a shared sense of community and a desire, whether explicit or implicit, to preserve or maintain the distinguishing characteristics of the group, such as religious beliefs, ethnic customs, traditions or a distinct language. The typical responses to minority rights claims, within states, international human rights

⁹ *ibid.*, p. 12.

¹⁰ *cf.* Niamh Nic Shuibhne, *The Status and Use of the Irish Language in the Legal System*, (unpublished LL.M. Thesis, National University of Ireland, Galway, 1995), Chapter 4.

instruments and institutional bodies such as the EC, have been charted by Skutnabb-Kangas and Phillipson; they range from the assimilation-oriented extreme of prohibition, through to toleration, non-discrimination, permission and, finally, the maintenance-oriented policy of promotion.¹¹

In the specific context of minority languages, it is necessary to establish which languages should be protected in any political situation. Réaume considers that the allocation of government support should be determined not on grounds of the size or critical mass of a language group alone, but also incorporating the criterion of viability; using this formulation, she refers to "...currently viable language communities, each able to sustain for its members a reasonably full cultural life."¹² She further qualifies this condition by adding that "[t]he argument that a language group deserves special protection is not based on the fact that other groups have it, but that this group needs it and can make use of it."¹³ The size of a language group does not necessarily condition the *existence* of language rights but affects instead their implementation in practical terms: this issue is considered further *infra* in the context of group rights. Addressing the specific criteria enunciated by Réaume, MacMillan counterargues that the very fact that certain members of society are necessarily excluded from the domain of minority language rights, given that only individuals in particular social contexts can claim them, violates the condition of universality which is, he argues, a central premise of fundamental human rights.¹⁴ But using this logic to detract from the status of language rights as fundamental rights is not a valid argument. Tourists and immigrants can be excluded from the implementation of other fundamental rights, such as the right to vote, for example. In terms of social context, a worker does not have the right to claim concurrent social

¹¹ Skutnabb-Kangas and Phillipson, "Linguistic human rights, past and present", in Skutnabb-Kangas and Phillipson (eds.), *supra* note 2, 71-110 at 79-80.

¹² Réaume, *supra* note 1, p. 54.

¹³ *ibid.*, p. 56.

welfare benefit. Moreover, in the specific context of minority language rights, individuals who speak majority languages already *have* the right to use their language for official purposes. Minority language rights strive to redress an imbalance rather than to create any privilege.

Another aspect of determining which minority languages engender language rights is whether protection covers native languages on the basis of natural justice principles only or includes native languages, and possibly acquired languages, on the basis of the right to choice of language. The principles of natural justice refer to basic language rights acquired by virtue of not understanding a certain language or languages. Interpreters would only be introduced into court proceedings, for example, where the accused or a witness does not understand the language through which the proceedings are being conducted; it would be unjust that the rights to liberty or property of an accused could be determined where s/he was not able to follow the proceedings. The provisions for appointment of interpreters in the European Convention on Human Rights, for example, are based on the natural justice criterion and are discussed further *infra*. In contemporary life, however, it is becoming increasingly rare that speakers of minority languages are not additionally competent in one or more languages of wider communication. Thus, the broader question of allowing individuals to use the language of their *choice* in a majority/minority language situation arises. Using this principle, it is irrelevant that the individual seeking to use a minority language for official purposes is competent to use the majority language through which a court or other authority normally functions. The right to choice of language fully accommodates the preference of the individual, with any costs of interpretation or translation falling on the state or international entity involved. Whether this right to choice of language is a fundamental right is discussed in the following section. It may be pointed out at this stage, however, that a further contention exists within the linguistic choice thesis itself *i.e.* whether the right to choice of language should exist to protect mother tongues only or should also cover

¹⁴ C. Michael MacMillan, "Linking theory to practice: Comments on the 'Constitutional protection of language'", in Schneiderman (ed.), *supra* note 1, 59-68 at 61-2; MacMillan cites the exclusion of tourists and immigrants as examples.

languages acquired voluntarily. MacMillan, for example, restricts the definition of language rights to "...a right to one's mother tongue or native language...not simply a right to speak a language *per se* but rather the language of one's heritage."¹⁵ It must be acknowledged that the vast majority of those who wish to avail of the right to speak a minority language are native speakers of the particular language in question. But it is arguable that the language choice concept should not exclude those who have acquired a minority language at a later stage in their lives and choose voluntarily to communicate through the medium of that language where possible. The Canadian Supreme Court pronounced on this question in *Attorney General of Quebec v. Nancy Forget*, stating clearly that "[t]he concept of language is not limited to the mother tongue but also includes the language of use or habitual communication....There is no reason to adopt a narrow interpretation which does not take into account the possibility that the mother tongue and the language of use may differ."¹⁶ Piatt compares language choice to choice of religion, which is also mutable yet steadfastly protected.¹⁷

(ii) Theoretical Framework to justify Language Rights as Fundamental Rights

Declarations on the value of linguistic diversity are reaffirmed continuously within a wide variety of perspectives and theories - cultural, historical, anthropological and sociological. Advancing these arguments to the legal realm of fundamental rights has been described as "...an attempt to harness fundamental principles and practices from the field of human rights to the task of rectifying some linguistic wrongs...."¹⁸ In one of the few studies examining this possibility, Green outlines the key questions as follows: "[a]re language rights legal rights only, justiciable in court but without deeper moral foundation? Or are they on a footing with the more familiar

¹⁵ *ibid.*, p. 61.

¹⁶ [1988] 2 SCR 90 at 100.

¹⁷ Bill Piatt, "Toward domestic recognition of a human right to language", (1986) 23 *Houston Law Review*, 885-906 at 901.

¹⁸ Skutnabb-Kangas and Phillipson, "Linguistic rights and wrongs", (1995) vol. 16:4 *Applied Linguistics*, 483-504 at 483.

fundamental rights...? If so, [a]re they perhaps derivatively related to other fundamental rights, for example, freedom of expression?"¹⁹ The primary advantage of establishing that language rights are fundamental rights, as opposed to legal claims not rooted in principle but in the realm of social organisation, is that if a right is grounded in moral considerations, its status is higher than that of a principle based in the discretionary arena of administrative policy. Thus, its recognition and implementation would not be dependent on the potentially inconstant will of policy makers.²⁰ The significance of this distinction cannot be overstated, given the resistance often encountered towards the implementation of linguistic choice, discussed in Chapter 1 *supra*. Placed in this context, arguments advanced in favour of dispensing with "...argumentation in the moral order that could have been better spent trying to achieve political results directly..."²¹ are unrealistic, as they presuppose a (frequently elusive) supportive political environment. Rickard elaborates on this submission as follows:

[If] protection...is a mere policy option to be adopted or not, depending on the social climate of the day, it is itself subject to the very conditions that generate and entrench minority disadvantage. The democratic processes that guide policy are essentially majoritarian in nature, and there is no assurance that mainstream interests will not dominate in those decisions. Policies that advantage minorities at the apparent expense of the majority are likely to be unpopular and have low priority...A regime of protection...would [need] to be deep enough to extend into the basic institutional structure where the problem has its roots.²²

Green applies theories based on the correlativity of rights and duties, developed principally by Joseph Raz, as a starting point for the classification of language rights as fundamental rights.²³ Raz outlines the basic idea that a legal right is a fundamental

¹⁹ Leslie Green, "Are language rights fundamental?", (1987) 25 *Osgoode Hall Law Journal*, 639-669 at 640.

²⁰ cf. Maurice Rickard, "Liberalism, multiculturalism and minority protection", (1994) vol. 20:2 *Social Theory and Practice*, 143-170 at 154: "[T]his strategy would render minority protection an optional and discretionary thing. It would not be morally required, and its implementation would be subject to the to-and-fro of day-to-day politics, policy and legislation."

²¹ Alfred P. Rubin, "Are human rights legal?", in Yoram Dinstein and Mala Tabory (eds.), *The Protection of Minorities and Human Rights*, (Dordrecht: Martinus Nijhoff, 1992), 33-58 at 55-6.

²² Rickard, *supra* note 20, p. 154/6.

right only where it protects some moral right.²⁴ Using variable concepts like natural law to establish what constitutes a moral right is no longer the prevalent approach adopted by legal theorists: as Green states bluntly, “[w]e need not seek timeless, transcendental proofs of the existence of fundamental rights, and it is just as well since we will not find them.”²⁵ The alternative legal basis provided by Raz has gained some credence in contemporary theory *i.e.* a moral right to ‘x’ exists if and only if some person’s interest is sufficient reason for holding others, whether private individuals or collective entities such as governments, to be under a duty to provide or secure ‘x’. The concept of ‘duty’ places fundamental rights beyond often discretionary administrative or policy decisions. Turi introduces a further element into the right/duty thesis, referring to duties as obligations that can ground the operation of legal sanctions when duties or obligations are breached.²⁶ Freeman adds that Raz’s construction does not preclude the recognition of collective rights as fundamental rights in certain instances.²⁷

On the basis that language claims are *legal* rights, which is the interpretation beyond which many theorists, governments and other entities will not concede, Green applies the general principles set out by Raz to the specific domain of minority language rights, to promote their status to fundamental rights. At the outset, he notes that the application of Raz’s theory does *not* require that all fundamental rights are equal or even of great importance: “[t]hus, one source of scepticism about language rights is immediately defused.”²⁸ It is imperative, however, that interests in language are justified as moral interests, to authorise placing a correlative duty on others, particularly governments and other executive and legislative institutions. Green

²³ Green, *supra* note 19, p. 647 *et seq.*

²⁴ *cf.* for example, Joseph Raz, “Multiculturalism: A liberal perspective”, (1994) *Dissent* 67-79.

²⁵ Green, *supra* note 19, p. 648.

²⁶ Joseph G. Turi, “Typology of language legislation”, in Skutnabb-Kangas and Phillipson (eds.), *supra* note 2, 111-119 at 116.

²⁷ Michael Freeman, “Are there collective human rights?”, (1995) 43 *Political Studies*, 25-40 at 30; the controversial issue of individual versus collective rights is addressed *infra*.

classifies interests in language as falling within two main categories, linguistic survival and linguistic security. Linguistic survival is the broader of the two concepts, referring to the survival of language groups over time. Thus, it relates to a goal of indefinite scope, in terms of both ambition and time, which seeks to combat the extinction of a particular language or languages. It is usually based on a desire for continuity, linguistic continuity specifically and cultural continuity more generally. Green defines linguistic survival as an abstract, aesthetic concept, which “...evinces a concern for languages as things in themselves rather than for their speakers.”²⁹ Similarly, Réaume asserts that “[i]t is not languages that have rights, but people.”³⁰ She refines the notion of linguistic survival even further, arguing that its success is contingent upon the language group maintaining a politically sovereign territorial base.³¹

Two arguments advanced in the context of minority languages relate to the theme of linguistic survival. First, it is constantly argued that linguistic diversity is a valuable attribute, both for individual speakers and for its contribution to the “...rich texture of human society.”³² Second, the historical circumstances that have impacted on the status or use of a language are often recited to justify the contemporary and future allocation of resources for the maintenance, or even revival, of that language. It is important to stress that neither Green nor Réaume seek to detract from the legitimacy of these arguments as absolutely valid concerns in themselves. They do not, however, accept that reasoning founded on linguistic survival can justify sufficiently the classification of language rights as *fundamental* human rights. As Réaume surmises:

[t]he interest in linguistic continuity would undoubtedly be sufficient to motivate people to teach their children their language and participate in cultural events which help improve the chances that the language will survive. But I am

²⁸ Green, *supra* note 19, p. 647.

²⁹ *ibid.*, p. 656.

³⁰ Réaume, *supra* note 1, p. 39.

³¹ *ibid.*, p. 39 *et seq.*

³² *ibid.*, p. 41.

doubtful that it is sufficiently strong to justify imposing duties on others who may have different and competing cultural ambitions....³³

While accepting the essence of these arguments, particularly in respect of attempting justification on historical bases, interests based on the inherent value of linguistic diversity, and the resultant duties placed on governments and other entities, cannot be discounted so readily: this argument was set out in detail in Chapter 1 *supra*.

An alternative interest in language is the achievement of linguistic security, a present-oriented concept based on the premise "...that one may use one's language with dignity."³⁴ As well as an individual interest in language, linguistic security also encompasses a social interest, based on interactions through a shared linguistic medium that represent an expression of the speaker's identity as a member of a language community. Social and individual considerations are interrelated, since linguistic security strives to ensure that "...speaking a certain language should not be a ground of social liability."³⁵ Language interests in communication and identity are grounded in the present, in contrast to the future, and also historically, oriented goals of language survival.³⁶ Applying the correlative rights/duties thesis to linguistic security, Green legitimates both the negative, tolerance-based principle of non-discrimination and the positive duty of proactive protection, to ensure that language use is facilitated effectively for both private *and* public functions. He asserts that "[t]he duties which this places on governments may make little difference to the long-term prospects of survival, but they will make an immediate and palpable difference to linguistic security."³⁷ Reaffirming the view that minority language

³³ *ibid.*, p. 44.

³⁴ Green, *supra* note 19, p. 658.

³⁵ *ibid.*

³⁶ Brett argues, however, that the notions of survival and security cannot be separated so definitely, suggesting that a perceived threat to the future survival of a language constitutes a threat that affects *present* speakers, and thus impinges on their linguistic security: Nathan Brett, "Language laws and collective rights", (1991) vol. 4:2 *Canadian Journal of Law and Jurisprudence*, 347-360 at 351.

³⁷ Green, *supra* note 19, p. 663.

rights are not special privileges, Réaume describes speakers of majority languages as already having "...*de facto* linguistic security."³⁸

A fundamental difference between survival and security is that linguistic security places responsibility for the fate of minority languages on, in the first instance, the speakers. In this context, Raz declares that "...public policies can only serve to facilitate developments desired by the population, not to force cultural activities down the throats of an indifferent population."³⁹ But, "...[while] the ultimate fate of a language community is up to its members...they should be protected from unfair or coercive pressures distorting normal practices of language use and transmission."⁴⁰ This justifies the imposition of correlative duties on governments and other entities in respect of minority languages that cannot compete equally on an open linguistic market. And, in the particular context of the distortion of normal language practices, the effects of EC integration on language use and transmission generate corresponding responsibilities towards language, and especially minority language, communities. Obviously, the attainment of linguistic security in the present will impact on a language group's long term survival, but language interests must be grounded in the present at first instance, to give rise to corresponding duties of implementation. MacMillan has expressed doubts about the validity of language rights as fundamental rights, based primarily on the absence of universality, as discussed *supra*; but he also questions the appropriateness of placing correlative obligations on governments.⁴¹ He has reservations, for example, in respect of hiring bilingual staff to provide bilingual or unilingual services. But such policies are commonplace in a number of EC Member States, and indeed EC institutions, and, significantly, have been challenged before but upheld by the European Court of Justice.⁴²

³⁸ Réaume, *supra* note 1, p. 46.

³⁹ Raz, *supra* note 24, p. 78.

⁴⁰ Réaume, *ibid.*, p. 47.

⁴¹ MacMillan, *supra* note 14, p. 61 *et seq.*

The interest of linguistic security satisfies the criteria for determining fundamental rights as moral rights, in the sense that the right to choice of language justifies placing duties and obligations on others, particularly governments and other collective entities. The central premise of linguistic security is dignity, related to identity and individual choice. On this basis, language rights share a common foundation with the vast majority of more widely acknowledged fundamental rights, which are also based on the dignity and equality of all individuals.

The fundamental right to choice of language is inherently linked to minority rights, a controversial and unsettled province of human rights law. It is not within the scope of this thesis to analyse minority rights theory in depth, but it is necessary to elucidate an interpretation of two concepts in particular: first, whether language rights are attributed to individuals only or can also be enjoyed by groups and, second, the nature of the duties imposed, in the negative/positive rights context.

(iii) Group/Collective Rights

This is one of the most controversial aspects of contemporary human rights theory. Under classic, liberal-democratic theory, fundamental rights inhere naturally and equally in every individual by virtue of his/her humanity. By focusing on individuals as the bearers of rights, the protection of groups *per se* is excluded, beyond the rights of each member of the group. It is not collective rights and duties as they apply to associations and corporations that have engendered debate; rather, it is the specific concept of collective *human* rights. The principal objections to collective human rights can be summarised as follows: the promotion of group rights would be used to justify the denial of individual human rights; they would constitute a threat to national stability, leading to secession and other forms of autonomy; there would be attempted justifications of cultural or religious practices that are generally regarded as unacceptable, such as the Hindu caste system; states could not afford to bear the costs of providing special facilities for minority groups, and positive action in favour

⁴² cf. for example, Case 379/87 *Groener v. Minister for Education and the Dublin Vocational*

of minorities would constitute discrimination against the remainder of the population.⁴³ The primary justification for restricting minority rights to individuals is to avoid the 'institutionalisation of minorities'.⁴⁴ This means that every member of a minority group should have a choice as to whether s/he wishes to remain in the distinctive group or assimilate into the majority population. There also exists an underlying belief that individual human rights automatically cover any rights relevant to groups and minorities, but this assumption has been dramatically disproved by contemporary political events across the globe. Moreover, notwithstanding the very real concerns raised, it is significant that most of the arguments listed were once used to thwart the development of fundamental rights in general.

As noted *supra*, Raz's theory of fundamental rights can apply equally to groups; it is arguable that a group interest is sufficient to place others under a correlative duty. Rather than viewing the harmonisation of individual and group rights as an attempt to reconcile two inherently discordant concepts, contemporary theorists strive to stress their compatibility. Freeman asserts that "[c]ollective human rights are rights the bearers of which are collectivities, which are not reducible to but are consistent with individual human rights...."⁴⁵ The 'group' aspect of fundamental rights is often related to implementation rather than origin. In the specific context of language rights, Réaume places group rights within the social dimension of language practices.⁴⁶ To distinguish the implementation of rights from the controversial question of who actually bears them, she writes that "...the group protected by [language] rights requires a community [large enough to warrant them], yet it is possible, for enforcement purposes, legally to define the right-holder in

Education Committee, [1989] ECR 3967, discussed in Chapter 2 *supra*.

⁴³ cf. Gillian Triggs, "The rights of peoples and individual rights: Conflict or harmony?", in James Crawford (ed.), *The Rights of Peoples*, (Oxford: Clarendon Press, 1992), 141-157.

⁴⁴ Capotorti, "The protection of minorities under multilateral agreements on human rights", (1976) 2 *Italian Yearbook of International Law*, 3-32 at 19.

⁴⁵ Freeman, *supra* note 27, p. 38.

⁴⁶ Réaume, *supra* note 1, pp. 48-50.

individualistic terms.”⁴⁷ Using this definition, correlative duties are justified by the combined strength of minority language speakers as a group, yet this does not in any way diminish the fundamental language rights that each speaker enjoys as an individual and not only by virtue of his/her membership of the group. This construction is highly beneficial in that it gives to the language group the extended benefits of claiming rights as a collectivity, yet avoids the difficult and controversial theoretical debate surrounding the origins of the rights. Thus, Freeman talks about collective rights occupying a ‘third space’, “...recognising the value of both individual autonomy and collective solidarity, reconciling liberal universalism and cultural pluralism.”⁴⁸

A related question is whether language rights apply irrespective of geographical location, based on the personality principle, or should correspond to a specific geographical area (the territorial principle), as practised in *e.g.* Belgium. Grin outlines the main features of both in the context of individual and group rights:

The personality principle is generally regarded as offering better safeguards to individuals, whose language rights are not subject to geographical restrictions, while the territorial principle is usually seen as a better protection for collective rights, because it is considered more conducive to the maintenance of linguistically homogenous settings in which a group’s language and culture can thrive.⁴⁹

But strict or absolute compliance with the territorial principle goes against the grain of minority language rights, by compelling linguistic choices on individuals. Once again, it is preferable to regard personality/territorial policy choices in terms of the extent to which services should be provided rather than in the context of actually granting language rights in the first place.

(iv) The Nature of the Duties Imposed: Negative versus Positive Rights

⁴⁷ *ibid.*, p. 49.

⁴⁸ Freeman, *supra* note 27, p. 40.

⁴⁹ François Grin, “Combining immigrant and autochthonous language rights: A territorial approach”, in Skutnabb-Kangas and Phillipson (eds.), *supra* note 2, 31-48 at 35.

One of the questions posed *supra* asked whether choices related to language use are covered automatically by the ingredients of democracy *e.g.* freedom of expression, natural justice and the requirements of the rule of law. Green points out that these principles govern language use under normal conditions only, "...where there is no need for distinctive rights protecting interests in a particular language."⁵⁰ 'Normal conditions' can be taken to imply the use of majority languages, where the language rights of speakers can typically be taken for granted. The situation is quite different, however, for speakers of a minority language, who cannot use that language in the same range of domains or outlets as their counterpart majority language speakers. This is where the implementation of minority language rights arises. It has been established *supra* that (minority) language rights constitute fundamental rights, in the sense that they are capable of imposing a correlative duty on others, including governing entities. This section considers the nature of the duties that can be imposed, across the broad spectrum from reactive tolerance to proactive promotion.

Tolerance is the most basic manifestation of minority language rights, "...[extending] just barely beyond what civility already requires."⁵¹ On its own, a policy focused *solely* on tolerance cannot achieve substantive equality between speakers of majority and minority languages, but it is a prerequisite to the implementation of a successful language policy regime. It draws from democratic principles such as freedom of expression and communication, non-discrimination and, as outlined earlier, the principles of natural justice. Tolerance is associated primarily with the private or non-official use of languages; it prescribes, for example, against prohibiting language groups from organising their own cultural events or educational structures.

To implement substantive language rights, it is necessary to go beyond creating a climate of tolerance and non-discrimination. This involves the adoption of positive measures designed to place speakers of majority and minority languages on an equal footing so far as possible, in respect of the public or official use of languages.

⁵⁰ Green, *supra* note 19, p. 641.

Governments usually formulate such measures within the framework of an official languages regime, grounded in constitutional or legislative provisions, or involving both; examples include providing for language choice beyond the requirements of natural justice in the courts, government services, legislature, state education facilities, *etc.* The imposition of language duties in the public sphere is justified by Réaume, on the basis that policy formulation on the official use of languages is firmly within the control of the government itself.⁵² Conversely, participation in political institutions is an essential feature of all democratic communities; inclusive participation by *all* citizens, irrespective of choices made on issues such as language, must be secured. Thus, it is not enough “...to refrain from interfering with the language use of the minority.”⁵³ Kymlicka is particularly critical of any application of non-discrimination that does not involve the adoption of complementary positive measures, arguing that “...the ideal of benign neglect is not in fact benign....[T]rue equality requires not identical treatment, but rather differential treatment in order to accommodate differential needs.”⁵⁴ This extract introduces the controversial debate over the legitimacy of affirmative action programmes, which have increasingly become subject to criticism and derision, particularly in the United States. The primary objection to affirmative action policy is that it amounts to discrimination against a contemporary majority for historical offences against various minority groups. But minority language rights do not demand the creation of special privileges; they strive to achieve the enjoyment of the same rights already taken for granted by speakers of majority languages. Using a historical or future oriented justification for language rights has already been called into question; emphasis was placed instead on the linguistic security of contemporary speakers. Moreover, it was stressed that the primary responsibility for the viability of a language group lies with the members of the group themselves. Government policy can facilitate language

⁵¹ *ibid.*, p. 660.

⁵² Réaume, *supra* note 1, p. 53.

⁵³ *ibid.*, p. 54.

⁵⁴ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, (Oxford: Clarendon Press, 1995), pp. 110-3.

choices but should not seek to impose them arbitrarily. In this context, it was argued that the implementation of language rights should not involve the involuntary imposition of language choices on *unwilling* citizens.⁵⁵ What remains paramount is the *effective* implementation of language rights, a difficulty associated with most fundamental rights concerns. Any abstract declaration of fundamental rights without a commitment to their implementation is a meaningless exercise; similarly, non-discrimination clauses adopted without the introduction of policies to actively eliminate existing discrimination and to facilitate substantive equality, which may involve differential treatment, will remain a hollow ideal.

3. FUNDAMENTAL RIGHTS AND THE EUROPEAN COMMUNITY

The inclusion of minority language policy in the EC's jurisdiction on cultural matters, formalised by Article 128 EC, was discussed in Chapter 4 *supra*. Measures adopted in that context can subsidise, facilitate and perhaps even promote minority languages as constituents of the broad cultural texture of the Member States. It was argued, however, that "[c]ulture is not merely about works of art, and it follows that the cultural dimension of the EC is about much more than aesthetics."⁵⁶ But while the definition of culture in the abstract was shown to be broad and inclusive, the cultural jurisdiction granted to the EC displays neither characteristic. Furthermore, policies grounded in Article 128 are unlikely to proceed beyond the aesthetic dimension of culture without a fundamental change in the perspectives of the Member States on the role of the EC in this domain. The cultural aspect of language policy is both valid in itself and vital to the maintenance and flourishing of any language group. But bracketing language issues into a narrow cultural perspective will not redress the practical difficulties faced by speakers of minority languages on a daily basis due to the restricted domains in which they may use their languages. Zuanelli distinguishes between the rights of languages, which include guarantees on

⁵⁵ *cf.* Réaume, *supra* note 1, p. 54 *et seq.*

⁵⁶ Fintan O'Toole, "Culture and media policy", in Patrick Keatinge (ed.), *Ireland and EC Membership Evaluated*, (London: Pinter, 1991), 270-276 at 270.

education and cultural concerns, and language rights, the fundamental rights of speakers to use their languages for other purposes.⁵⁷ Language policy in the cultural realm can provide for the rights of languages, for linguistic survival, but it cannot accommodate the fundamental right of minority language speakers to linguistic security.

The gradual recognition and protection of fundamental rights by the EC institutions can be placed in the context of an awareness by the international community more generally of the limits on government powers. EC fundamental rights jurisdiction does not just guide the institutions, however, but may also impinge upon the Member States when they are administering Community law or restricting Community freedoms on grounds of public policy.⁵⁸ Yet, despite the seemingly extensive protection of human rights at national and international levels, Clapham has remarked that "...the legal landscape is presently littered with craters so that citizens may often find themselves without adequate legal protection...."⁵⁹ In respect of minorities, the trend in international forums has changed noticeably in recent times, with renewed interest in minority rights as an independent concern, complementary to but distinct from traditionally protected fundamental rights. Language rights have been raised both as a subset of minority rights and as an autonomous category of duty-imposing rights. Skutnabb-Kangas and Phillipson note that "[s]ubstantial efforts are currently underway in many supranational forums to produce declarations, conventions and charters which can promote respect for the rights of minority language speakers."⁶⁰ But most difficulties exist in the realm of implementation rather than declaration. At first glance, the EC is a most unlikely advocate of any

⁵⁷ Elisabetta Zuanelli, "Italian in the European Community: An educational perspective on the national language and new language minorities", in Florian Coulmas (ed.), *A Language Policy for the European Community: Prospects and Quandaries*, (Berlin; New York: Mouton de Gruyter, 1991), 291-300 at 297.

⁵⁸ cf. Manfred A. Daus, "The protection of fundamental rights in the Community legal order", (1985) *European Law Review*, 398-419 at 418.

⁵⁹ Andrew Clapham, "A human rights policy for the European Community", (1990) 10 *Yearbook of European Law*, 309-366 at 344.

fundamental rights that are not linked directly to the implementation of some Community policy; possibilities for the protection of language rights by the EC lie more in the projected future development of fundamental rights and citizenship than within these regimes as they presently exist. It will become clear, however, that reform of the role played by the EC in both domains is widely sought in any case.

*A. The 'Distillation of a Rights Jurisprudence'*⁶¹

The protection of fundamental rights by the EC constitutes the fulfilment of a historical ambition rather than a contemporary innovation. Proposals for the creation of a European organisation to regulate political as well as economic activities fell by the wayside in the early 1950s, as states were not yet prepared to cede national sovereignty to such an extent.⁶² Fundamental rights did not feature explicitly in the Treaty of Rome,⁶³ but this was not surprising given the "...sober, utilitarian considerations..." of the original EEC and the fragility of inter-state relations at that time.⁶⁴ O'Leary adds that the original contracting parties to the EEC Treaty could not have been aware of the potential implications of evolving Community law on fundamental rights.⁶⁵ It is widely acknowledged that judicial activism within the European Court of Justice was primarily responsible for introducing fundamental rights norms into the EC arena. Initially, the Court resisted arguments based on human rights principles.⁶⁶ This led to tensions between the EEC and some Member

⁶⁰ Skutnabb-Kangas and Phillipson, *supra* note 11, p. 72.

⁶¹ Patrick M. Twomey, "The European Union: Three pillars without a human rights foundation", in David O'Keefe and Patrick M. Twomey, (eds.), *Legal Issues of the Maastricht Treaty*, (London: Chancery, 1995), 121-132 at 124.

⁶² The Treaty establishing the European Defence Community (EDC) was signed in 1952; proposals for the creation of the European Political Community (EPC), a transnational organisation with policies of considerably broad application, were put forward in 1953. The EDC Treaty was not, however, ratified, leading to the abortion of contingent plans for the EPC also.

⁶³ Dausies identifies a number of quasi-rights provisions, however, such as the prohibition of discrimination on grounds of nationality [Article 7 EEC] and the principle of equal pay for equal work irrespective of gender [Article 119 EEC]: *supra* note 58, pp. 398-9.

⁶⁴ *ibid.*, p. 399.

⁶⁵ Siofra O'Leary, "Accession by the EC to the ECHR: The Opinion of the European Court of Justice", (1996) 4 *European Human Rights Law Review*, 362-377 at 363.

States, who were concerned that a legal system which was establishing supremacy over domestic law was not accountable in terms of fundamental rights. The response of the ECJ is well documented. In the landmark decision in *Stauder v. City of Ulm*⁶⁷, the judgment referred tersely (*obiter dictum*) to "...the fundamental human rights enshrined in the general principles of Community law and protected by the Court."⁶⁸ The Court did not elaborate on either the nature or scope of these rights at that time but proceeded tenuously, in a series of subsequent judgments, to weave a more complete rights jurisprudence. It was confirmed that an independent rights protection regime existed in the Community legal order, drawn from and inspired by the protection of rights as a feature of the common constitutional traditions of the Member States,⁶⁹ as well as the fundamental rights protected by international treaties, with particular emphasis on the European Convention on Human Rights (ECHR).⁷⁰ It was established beyond doubt that Community measures contravening fundamental rights would be struck down. The Court has always made clear that the Community rights regime is an autonomous legal order, going beyond automatic deference to either national constitutional law or the ECHR. It was established from the outset that the rights protected "...must also be consistent with the framework of the structure and objectives of the Community...", so long as the substance of the right in question is not impaired.⁷¹ The Court's jurisprudence was endorsed by a Joint Declaration of the Parliament, Council and Commission, issued on 5 April 1977.⁷²

⁶⁶ Case 1/58 *Stork v. High Authority* [1959] ECR 17; Cases 36-38, 40/ 59 *Geitling v. High Authority of the ECSC* [1960] ECR 523; Case 40/64 *Sgarlata v. Commission of the EEC* [1965] ECR 215.

⁶⁷ Case 29/69, [1969] ECR 419.

⁶⁸ *ibid.*, p. 419, para. 7.

⁶⁹ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁷⁰ *cf.* Case 4/73 *Nold v. Commission* [1974] ECR 491; Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

⁷¹ Dausies, *supra* note 58, p. 401.

⁷² [1977] OJ C-103.

Dauses notes that, initially, the Court focused on economic and social rights, “[i]n view of the predominantly economic nature of the objectives of the Community.”⁷³ A broader regime has evolved, however, in keeping with the gradual extension of Community competence and the enlargement of Treaty objectives.⁷⁴ A number of writers have been sceptical of the Court’s reliance on general Community objectives to counterbalance fundamental rights recognised by the Member States.⁷⁵ The delimitation of competence between the Community and the Member States in the fundamental rights domain is discussed in more detail *infra* but it is interesting to note the pragmatic view outlined by Phelan, who observes that “[w]hen numerous judges from [the diverse] legal systems [of the Member States]...are obliged to decide cases in widely disparate fields under a new and complex legal system which each Member State, in addition to private parties, is trying to influence in its own favour, it is not surprising that they should give general objectives such prominence.”⁷⁶

The Preamble to the Single European Act refers to both the ECHR and the European Social Charter, but a more definite legal basis for action in the human rights sphere was not established until the enactment of the Treaty on European Union. Article F(2) TEU confirms that the Union must respect fundamental rights derived from the sources already outlined by the Court of Justice; but the Court does not have jurisdiction over the implementation of this obligation. Fundamental rights protected by the *Community* do, however, remain within the jurisdiction of the Court. Krogsgaard notes that Article F(2) did not merit high priority on the Maastricht agenda.⁷⁷ This is not surprising, given that the new provision added little to the

⁷³ Dauses, *supra* note 58, p. 402.

⁷⁴ O’Neill lists a number of political rights now protected by the Court, including the rights to privacy, freedom of expression, fair hearing and due process: Michael O’Neill, “Fundamental rights and the European Union”, in Gerard Quinn (ed.), *Irish Yearbook of Human Rights*, (Dublin: Round Hall Sweet and Maxwell, 1995), 67-95 at 68-9.

⁷⁵ *cf.* in particular, Jason Coppel and Aidan O’Neill, “The European Court of Justice: Taking rights seriously?”, (1992) 29 *Common Market Law Review* 669-692.

⁷⁶ Diarmuid Rossa Phelan, “Right to life of the unborn v. promotion of trade in services: The ECJ and the normative shaping of the European Union”, (1992) vol. 55:5 *Modern Law Review*, 670-689 at 686.

existing *acquis communautaire*; the already troubled negotiations avoided the controversial question of EC enforcement of Member State fundamental rights duties beyond the implementation of Community law. The Amsterdam Treaty consolidates the existing regime of protection and introduces a number of further initiatives, including a procedure for suspension of a Member State in cases of serious and persistent breaches of fundamental rights and the expansion of the jurisdiction of the Court of Justice in fundamental rights issues.⁷⁸ Article 6a(13), which creates competence for the EC to combat discrimination in a number of guises does not, however, include linguistic discrimination. This is both surprising and disappointing, in light of the supposed commitment of the EC to linguistic pluralism and the existence of other international standards on language rights, discussed *infra*.⁷⁹

After setting out a number of rights and correlative duties that exist at national level only,⁸⁰ Clapham categorises the fundamental rights recognised by the Community to date: first, rights at national level in respect of the application of Community law, second, rights in the context of action by Community institutions or agents and, finally, rights granted by the Community itself, such as social rights and citizenship rights.⁸¹ But these rights have never been enumerated precisely in the Treaties, or in any other legal instruments; the controversies that usually surround jurisprudential developments grounded in judicial activism and discretion have also, therefore, beset the Court's formulation of the obligations on the EC and its Member States. The following sections discuss these uncertainties, in the context of the sources of rights protected in the Community legal order.

⁷⁷ Lars Bondo Krogsgaard, "Fundamental rights in the EC after Maastricht", (1993) *Legal Issues of European Integration*, 99-113 at 105.

⁷⁸ cf. Anthony Whelan, "Fundamental rights", in Ben Tonra (ed.), *Amsterdam: What the Treaty Means*, (Dublin: Institute of European Affairs, 1997), 147-158.

⁷⁹ *ibid.*, pp. 155-6.

⁸⁰ e.g. Cases 60, 61/84 *Cinéthèque v. Fédération Nationale des Cinémas Français* [1985] ECR 2605, where the ECJ noted that it had no power to assess the compatibility of domestic law with the ECHR in an area that fell solely within national jurisdiction.

B. Fundamental Rights drawn from International Treaties

In *Nold v. Commission*, the Court of Justice declared that "...international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."⁸² In reality, the international instrument to which the Court refers almost exclusively is the ECHR, although instruments of universal application have also been mentioned in some judgments.⁸³ The absence of references to other international treaties is purely a matter of practice; the Court is not legally precluded from referring to such treaties to derive inspiration in future cases where appropriate. It remains open to the Court to refer to Article 27 of the UN International Covenant on Civil and Political Rights, for example, which sets out specific minority rights, discussed *infra*. O'Neill notes that international treaties in general are not referred to in Article F(2) TEU, which mentions the ECHR exclusively.⁸⁴ But this oversight affects fundamental rights within the Union only and does not disturb the *acquis communautaire* on rights protected by the Community.

The ECHR was first mentioned specifically by the Court in *Rutili*.⁸⁵ Dauses distinguishes between the "...suprapositive principles of law incorporated in the Convention...", which constitute an independent source of law that takes precedence over even primary Community law, and the Convention itself as the embodiment of those principles, which is subordinate to the EC Treaties.⁸⁶ This distinction has enabled the Court of Justice to sometimes go beyond the protection given to certain rights by the Convention, where the Court interprets fundamental rights *principles* as distinct from interpreting or being bound by the substantive *provisions* of the

⁸¹ Clapham, *supra* note 59, pp. 317-8.

⁸² Case 4/73 *Nold v. Commission* [1974] ECR 491 at 507.

⁸³ O'Neill, *supra* note 74, cites Case 374/87 *Orkem v. Commission* [1989] ECR 3283, where the Court referred to Article 14(3)(g) of the UN International Covenant on Civil and Political Rights (*re*: the right against self-incrimination).

⁸⁴ *ibid.*, p. 89.

⁸⁵ Case 36/75 *Rutili* [1975] ECR 1219.

Convention itself. Clapham is critical of this development, arguing that “[i]f...the Court of Justice is serious about protecting human rights in the Community legal order then it should show more deference to the Strasbourg case-law.”⁸⁷ But it is widely recognised in international human rights law generally that treaty provisions represent a compromise, mirroring the level of agreement achieved among often divided negotiating parties; any measures that give *additional* protection for fundamental rights are not only valid but welcomed. In an ECJ case dealing with language rights in criminal proceedings, discussed in Chapter 2 *supra*, Advocate General Lenz set out the position of the EC on this illusory conflict as follows: “[i]t is not contrary to the ECHR for Community law to grant more extensive protection to individual rights. Indeed, the Court has held that Community law takes precedence over other agreements concluded within the framework of the Council of Europe *in so far as it is more favourable to individuals*.”⁸⁸ The continuing controversy that characterises the relationship between the Luxembourg and Strasbourg courts suggests that it is one of divisive, counterproductive tension. It is difficult to assess, however, what the situation is in reality or the extent to which the difficulties are perpetuated by competing academic perspectives.

The Court of Justice’s recent opinion on whether or not the EC can accede to the ECHR thwarted the momentum of arguments long advanced in favour of accession. The Court held that accession would only be possible following a Treaty amendment, given the constitutional significance attached to entering a “...distinct international institutional system”.⁸⁹ Although the Commission did not favour accession initially,⁹⁰ its perspective changed gradually to that of actively recommending that the

⁸⁶ Dauses, *supra* note 58, p. 412.

⁸⁷ Clapham, *supra* note 59, p. 338.

⁸⁸ Opinion of Advocate General Lenz in Case 137/84 *Ministère Public v. Mutsch* [1985] ECR 2681 at 2690, citing Case 187/73 *Callemeyn v. Belgium* [1974] ECR 553 (emphasis added).

⁸⁹ Opinion 2/94, 28 March 1996, [1996] ECR I-1759.

⁹⁰ *cf.* Commission’s response (EC Bull. Supp. 5/76) to the European Parliament ([1973] OJ C-26/7) on how the fundamental rights of Member State citizens could best be protected; the Commission favoured protection via the case-law of the Court of Justice rather than by accession to the ECHR.

Community should ratify the Convention. In a 1979 memorandum, the Commission stressed that accession would portray a favourable image of the Community and acknowledged that it would ensure consistent and harmonious interpretation of the ECHR.⁹¹ Clapham is critical, however, of the Commission's failure to examine the question from the perspective of fundamental rights protection for individual citizens, dismissing the Commission's reasoning as based largely on self-interest in the Community context.⁹² The Commission's stance has, however, evolved over the years: it argued in 1990, for example, that accession to the Convention would redress an imbalance, in that the EC institutions were not subject to the control mechanism of the Council of Europe, and would constitute an additional guarantee that human rights were being respected in the Community.⁹³ O'Leary summarises the advantages of accession, on the bases of democracy, legitimacy, valuable symbolism, consistency in interpretation of the Convention and broadening the ambit of EC fundamental rights protection beyond the limited scope of the application of Community law.⁹⁴ She does, however, identify some problematic aspects of accession, particularly that the ECHR provides only a basic, minimum standard of protection.⁹⁵ She argues in response that the Convention is not a static but an evolving instrument that has been interpreted by the European Court of Human Rights accordingly: this issue is addressed *infra* in the specific context of language rights under the Convention. O'Leary also points out that the ECHR should be viewed as "...the safety net but not the standard setter..."; she argues that should the Community accede, the Union, as distinct from the Community, could still supplement and improve on areas falling outside the remit of the Convention. But it is difficult to gauge why O'Leary has distinguished between the Community and the Union in this context. As already outlined, there is nothing to prevent *any* party to the

⁹¹ 6724/76 Bull. Supp. 2/79; *cf.* also Clapham, *supra* note 59, p. 361.

⁹² *ibid.*, pp. 361-2.

⁹³ Commission Communication on Accession to the ECHR, [1990] Bull.EC 11/1990.

⁹⁴ O'Leary, *supra* note 65, p. 369.

⁹⁵ *ibid.*, pp. 370-2.

Convention, whether a State or the Community if it should ever accede, from introducing measures that strive to implement *greater* protection than that offered by the Convention: the standards set by any international instrument are the lowest common denominator, and not the last word, on the acceptable standards of rights protection.

The current position, then, is that the Court of Justice may draw inspiration from international treaties when developing the fundamental rights jurisdiction of the Community. It has not relied extensively on any instrument other than the ECHR, although this situation has resulted from practice rather than any legal prohibition. The Court has, on occasion, applied fundamental rights principles in a manner that appears inconsistent with their codification in the relevant Convention provisions, but this approach is only adopted to grant more extensive protection than that provided for in the Convention itself. While this has caused tension in terms of consistency of interpretation, it is typically beneficial for individuals. Whether or not international instruments provide sufficiently for language rights, and whether their application can be related to the scope of Community law, is assessed briefly *infra*.

C. Provision for Language Rights in International Treaties

(i) The United Nations ⁹⁶

As noted earlier, the United Nations approached human rights from the perspective of universal application, based on the dignity and equality of each individual person, in contrast to the protection of minority groups that had been undertaken by the League of Nations. From the outset, however, all UN rights instruments protected language in their non-discrimination clauses *e.g.* Article 1(3) of the UN Charter (1945), Article 2 of the Universal Declaration on Human Rights (UDHR - 1948) and Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966 and operative ten years later. The UDHR provisions on equality before the law (Article 7), freedom of expression (Article 19), education (Article 26) and freedom of participation in cultural life (Article 27) are also relevant to language

issues. In addition, the UN Commission on Human Rights established the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1946.⁹⁷ The principal protective mechanism for minority rights is contained in Article 27 ICCPR, which provides that “[i]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” Article 27 represents a hybrid of group and individual rights, in that the rights are bestowed on individuals but ‘in community’ with other group members. The provision has also been interpreted as placing reciprocal duties of implementation on states.⁹⁸ The ICCPR provides for both individual petition (based on an Optional Protocol to the Covenant) and state reporting, although it is widely acknowledged that neither mechanism can protect individual rights very effectively: the former is dependant on the relevant state having acceded to the Protocol, while the latter relies on a state’s own representations of the domestic human rights situation.

Overall, protection of individual rights by the UN, particularly a lower priority fundamental right such as the right to choice of language, is seen as a fairly remote possibility, given the multitude and extent of human rights atrocities with which the UN Human Rights Committee is preoccupied on an ongoing basis. But the increasing concern of the international community over minority rights violations was confirmed by the UN General Assembly’s Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, in 1992.⁹⁹ In particular, the Declaration refers expressly, in Article 1(2), to the positive obligation on states to provide legislatively and otherwise for the promotion of ethnic, cultural,

⁹⁶ For a more detailed description, cf. Nic Shuibhne, *supra* note 10, Chapter 4.

⁹⁷ cf. Asbjørn Eide, “The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities”, in Philip Alston (ed.), *The United Nations and Human Rights*, (Oxford: Clarendon Press, 1992), 211-264.

⁹⁸ Capotorti Report, *supra* note 5, p. 37; Decision of the Human Rights Committee in *Kitok v. Sweden*, Comm. No. 197/1985, 27 July 1985.

⁹⁹ Res. 47/135.

religious and linguistic identities. In addition, the Declaration is framed in more positive terms than Article 27 ICCPR, employing the phrase 'has the right' instead of 'shall not be denied the right'. The work of the UN in the realm of establishing norms and standards for international human rights law cannot be overestimated. The pace of its evolution may not yet correspond with the needs of the international community but the system continues to develop, challenging the traditional shelter of state sovereignty. To increase its effectiveness as an institution, the UN must develop its role in the implementation and enforcement of human rights law rather than concentrating on its traditional function as standard setter. Otherwise, non-binding instruments such as the 1992 Declaration will amount to nothing more than a collection of hollow aspirations. The UN has begun to grapple tentatively with the enduring question of minority rights in a contemporary context. This alone should signal to states, other political entities and individuals that minority rights matter. As a subset of minority rights, language rights, as fundamental rights, also warrant the imposition of effective obligations and duties on governing entities. The EC could draw from this distinct ethos where necessary; but the omission of language from the new non-discrimination clause contrasts bleakly with the standards developed by the UN.

(ii) The Council of Europe

The extent to which states have submitted to the jurisdiction of the Council of Europe illustrates the success of regional human rights action; it does not set out to thwart principles established on the basis of universalism, but seeks to apply and build on these standards, given that the states involved are more likely to have confidence in an organisation founded by a group of like-minded states, relative to the immense diversity of state actors in the universal international arena. Regional organisations are also more accessible to individuals who seek to enforce international standards against their own states. The success of the European Convention on Human Rights (ECHR) as an enforceable source of fundamental rights and freedoms is unparalleled in the international community, attributable largely to the acceptance by all signatory states of the compulsory jurisdiction of the

European Court of Human Rights. As discussed *supra*, the Court of Justice of the EC has drawn extensively on the provisions of the ECHR in establishing its own fundamental rights jurisprudence, but has not confined itself absolutely to either the provisions themselves or their interpretation by the Court of Human Rights. Nonetheless, the provisions of the ECHR clearly establish the basic level of rights protection that the Court of Justice will consider.

In contrast to the initiatives on fundamental rights generally, the protection of language rights in the ECHR is essentially disappointing. It can be divided into two main areas, the use of language in the courts and the principle of non-discrimination. Articles 5 and 6 of the Convention relate to the deprivation of personal liberty and the right to a fair trial respectively. Both provide for information to be delivered in a language understood by a person charged with a criminal offence; in addition, Article 6 stipulates that the free assistance of an interpreter is to be provided if the accused cannot understand or speak the language used in court proceedings.¹⁰⁰ But these provisions are grounded firmly in the restrictive principles of natural justice, relating only to instances where an individual cannot *understand* the language used by official authorities; they do not introduce any right to *choice* of language. The European Commission on Human Rights has refused relief to parties who understood the language used in domestic courts, for example, yet sought to have interpreters appointed so that they could speak another language of their choice, as members of minority language groups based in the states in question.¹⁰¹

Article 14 ECHR outlines a general prohibition on various forms of discriminatory treatment, including discrimination based on language. The provision is not, however, an independent guarantee of non-discrimination: its application is restricted to the contexts of other rights protected specifically by the Convention. Examples of rights that may be relevant to language choice include freedom of expression (Article

¹⁰⁰ Similar rights can be found in Article 14(3)(a) and (f) of the ICCPR.

10) and the right not to be denied education, set out in Article 2 of Protocol 1 to the Convention. Although the Commission on Human Rights has acknowledged the validity of cultural and linguistic pluralism in the context of the media,¹⁰² it decided in 1965 that Article 10 does not entitle individual citizens to communicate with public authorities in the language of their choice.¹⁰³

The most comprehensive discussion of linguistic minorities by the Court of Human Rights is contained in the complex *Belgian Linguistics Case*, decided in 1968.¹⁰⁴ The decision examined regional policies on the provision of state education, relating specifically to extensive legislative provisions made for unilingual regions. The Court held that unilingual policy measures were not discriminatory, notwithstanding the claims of minority language speakers who had sought to compel the Belgian state to provide education through the medium of French in officially delimited Dutch-speaking regions. Both the Court and the Commission interpreted Article 2 of Protocol No. 1 narrowly, stating that it did not contain any provision dealing with languages of instruction and that only instruction in the national language(s) of a state was relevant to ensuring implementation of a genuine right to education.¹⁰⁵ In a subsequent decision, the Commission reiterated that the Convention does not contain any provisions that grant rights explicitly to speakers of minority languages.¹⁰⁶ The

¹⁰¹ e.g. app. no. 10210/82 *K. V. France* 7 December 1983, 35 D&R 203; app. no. 11261/84 *Bideault v. France* 6 December 1986, 48 D&R 232; both relate to failed attempts to use the Breton language in French courts.

¹⁰² App. no. 10746/84 *Verein Alternatives Lokalradio Bern and Another v. Switzerland*, 16 October 1986, 49 D&R 126.

¹⁰³ App. no. 2333/64 *Inhabitants of Leeuw-St.Pierre v. Belgium*, [1965] 8 YBECHR 338.

¹⁰⁴ Series A., No. 6, 23 July 1968, 1 EHRR 252; c.f. Nic Shuibhne, "The impact of European law on linguistic diversity", (1996) vol. 5:1 *Irish Journal of European Law*, 62-80 at 65-6; Bruno de Witte, "Surviving in Babel? Language Rights and European Integration", in Yoram Dinstein and Mala Tabory (eds.), *The Protection of Minorities and Human Rights*, (Dordrecht: Martinus Nijhoff, 1992), 277-300 at 279-80.

¹⁰⁵ Decision of the Court, *ibid.*, para. 31; the Commission's report had been far more favourable, accepting a broader interpretation of Article 2/Protocol 1, when read in conjunction with Article 14 ECHR, and finding that the Belgian legislation infringed this guarantee in a number of respects.

¹⁰⁶ App. No. 8142/78 *X. v. Austria* 10 October 1979, 18 D&R 88; the Council Of Europe has prepared a Draft Protocol on the Rights of National Minorities, which has not yet been ratified.

evolving interpretation of the Convention is not, however, hinged exclusively to early decisions of the Court and Commission. Two dynamic principles are relevant in this context. First, the Court of Human Rights has held repeatedly, since its decision in *Marckx* (1979), that despite the negative formulation of rights and freedoms therein, the Convention does place a positive obligation on states to remove any obstacles to the exercise of those rights.¹⁰⁷ The Court has thus developed an effective recognition of positive rights notwithstanding the limiting phraseology of the Convention itself. Second, the Court has veered towards an evolutive, teleological interpretation of the Convention, reading its provisions in the context of evolving European standards.¹⁰⁸ Harris, O'Boyle and Warbrick describe the nature of and limitations to this interpretative approach:

[T]he Convention will not be interpreted to reflect change so as to introduce into it a right that was not intended to be included when the Convention was drafted...In this way, a line is sought to be drawn between judicial interpretation, which is permissible, and judicial legislation, which is not. [W]ith this distinction in mind, the Court tends to emphasise incremental, rather than sudden change. However, as in national law, the line between judicial interpretation and legislation can be a difficult one to draw....Decisions can be seen either as judicial creativity that move the Convention into distinct areas beyond its intended domain or as the elaboration of rights that are already protected.¹⁰⁹

Given repeated declarations by the Commission on Human Rights that there is no right to choice of language in the Convention, it is unlikely that the right could be introduced judicially. But the existence of an evolving European standard on minority language rights can be traced to the development of an autonomous instrument by the Council of Europe *i.e.* the European Charter for Regional or Minority Languages. Growing awareness within the European Parliament in the early 1980s of the need for effective action in support of minority languages directly inspired the Council of Europe to address this specific domain of fundamental rights at that time. Following a public hearing to consider the need for the adoption of a

¹⁰⁷ App. 31/79 *Marckx v. Belgium*; cf. D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths, 1995), pp. 19-22.

¹⁰⁸ cf. App. 26/78 *Tyler v. UK*; Harris, O'Boyle and Warbrick, *ibid.*, pp. 7-11.

¹⁰⁹ *supra* note 107, p. 8; de Witte, *supra* note 104, describes the Court's contemporary interpretation of the Convention as "...more sophisticated and probing..." (p. 280).

legal instrument to defend and promote the rights of minority language speakers, the text of the draft Charter was completed by March 1988. The Charter was adopted by the Committee of Ministers on 22 June 1992 and opened for signature on 5 November 1993. State response has, however, been disappointing: to date, it has been ratified by only eight states.¹¹⁰ The Charter is framed in terms of state obligations rather than legally enforceable individual rights, which may have inadvertently contributed to the subsequent, and continuing, reluctance of states to adopt and implement it. The apathetic reaction to the Charter is frustrating, however, given the discretion accorded to states when selecting the degree of obligation to be assumed, as well as the numerous qualifications attached to most of the provisions more generally *e.g.* the requirement that the number of speakers must be 'sufficient': the Charter itself does not, however, provide any objective criteria for determining when the number of speakers is sufficient, thereby allocating even more discretion to states.

Any instrument designed to apply to a number of diverse language groups must necessarily be sufficiently flexible, so that each state can adapt its obligations to the needs of each language group. But the format of the Charter, in seeking to accomplish this difficult but essential task, has diluted state obligations to an unacceptable extent. The Charter is designed in a 'pick and choose' format; a state must choose at least three provisions each from Articles 8 (education) and 12 (cultural activities and facilities), and one provision each from Articles 9 (judicial authorities), 10 (administrative authorities), 11 (media) and 13 (cultural and social life). By design, therefore, obligations that require more substantive administrative and monetary input on the part of signatory states have been relegated to the latter grouping. Furthermore, a state can choose the most innocuous sub-paragraph over more comprehensive measures at its own discretion. This weakens the position of individual minority language speakers considerably: states could legitimately comply with obligations assumed under the Charter yet to such a minimal degree as to render the obligations ineffectual in practice. For example, states are required to adopt only

one sub-paragraph from Article 10(1), which deals with the use of regional or minority languages in both oral and written dealings with public authorities. Options within the provision range from publishing official texts and documents in minority language versions, a potentially comprehensive requirement, to allowing an individual to use the minority language version of his/her name, which is little more than an expression of bare civility. Furthermore, an overall qualification of 'as far as this is reasonably possible' has been attached to Article 10(1). Essentially, effective implementation of the Charter depends ultimately on the goodwill of the state parties. The problem with this approach is that, generally, states that possess the requisite goodwill towards speakers of minority languages have *already* adopted measures similar to and even beyond those listed in the Charter. A state that has consciously refused to provide for minority language use in public domains is unlikely to select the more comprehensive obligations, that is, of course, if it even agrees to ratify the Charter in the first place. Thus, the Council must undertake the onerous task of encouraging flexibility while preventing abuse of the same concept.

Implementation of the Charter is supervised by a system of periodic state reports. International instruments that introduce relatively new or controversial rights usually adopt this mechanism to reduce counterproductive pressures on reluctant signatories, in order that state responsibilities might be realised progressively. As an enforcement mechanism, however, state reporting is not particularly effective, as it fails to incorporate a redress mechanism for the individual citizen.¹¹¹ Connelly argues that the establishment of complaints procedures, whether based on inter-state or individual petition, would have strengthened the position of minority language speakers to a far greater extent.¹¹²

The Charter must be interpreted as a beginning rather than an end. Skutnabb-Kangas and Phillipson recognise the dilemma that must have faced the drafters of the Charter

¹¹⁰ *i.e.* Croatia, Finland, Germany, Holland, Hungary, Liechtenstein, Norway and Switzerland.

¹¹¹ *cf.* Robertson and Merrills, *supra* note 4, pp. 41-50.

but warn against complacency in the context of implementation and enforcement: “[w]hile the Charter demonstrates how difficult it is to write binding formulations that are sensitive to local conditions, it permits a reluctant state to meet the requirements in a minimalist way which it can legitimate by claiming that a provision was not ‘possible’ or...numbers were not ‘sufficient’....”¹¹³ If the Charter can succeed in persuading states traditionally opposed to the recognition of language rights to enact even minimal safeguards for the speakers of minority languages, it will have achieved a significant breakthrough. For the meantime, the potentially fatal confidence in state discretion can be interpreted more favourably as the incorporation of flexibility.¹¹⁴ But the Council must continue to strive towards conferring *enforceable* language rights on individuals as a corollary of its work in the domain of state duty. Significantly, the Charter is not confined to situations where speakers do not speak or understand the national or official language(s) of the state signatories. It has, therefore, clearly surpassed the natural justice ethos underlying the language provisions of the ECHR and is firmly attuned to the realities of contemporary language acquisition and use, grounded in considerations of language choice. Consequently, the language choice doctrine should also be taken into account by the EC regarding any potential development of language rights in the Community context.

D. Fundamental Rights drawn from Common Constitutional Traditions

All EC Member States guarantee the protection of fundamental rights at national level.¹¹⁵ The Court of Justice can draw from the principles enshrined in national

¹¹² Alpha Connelly, “The European Convention on Human Rights and the protection of linguistic minorities”, (1993) vol. 2:2 *Irish Journal of European Law*, 281- 293 at 293.

¹¹³ Skutnabb Kangas and Phillipson, *supra* note 11, p. 91.

¹¹⁴ *cf.* Ferdinando Albanese, “Ethnic and linguistic minorities in Europe”, (1991) 2 *Yearbook of European Law*, 313-338 at 332-8.

¹¹⁵ Dauses, *supra* note 58, notes that the French Constitution does not contain a list of individual fundamental rights but refers to the 1789 Declaration of the Rights of Man; the UK does not have a written Constitution, but fundamental rights are considered to be “...a component part of the notion of a state governed by democratic principles and the rule of law...”, and are recognised implicitly in judicial decisions (p. 398); in addition, the UK government has recently decided to incorporate the ECHR into domestic law.

constitutions but will interpret and prioritise them in the context of Treaty objectives where necessary. In this way, the supremacy of EC law is not infringed. Usher explains this position, writing that "...the legality of a Community measure can never be judged in the light of national law but fundamental principles of national legal systems 'contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges'." ¹¹⁶ Dausies outlines the main difficulty with this source of rights, *i.e.* presupposing a 'common' standard in the first place, which implies that:

...all Member States are in agreement, at least in essence, in acknowledging a given number of unassailable fundamental and human rights...[But] although all the Member States are conscious of certain intellectual and political traditions...nevertheless, regardless of that common historical heritage, they go their own ways as regards method, structure, normative rank and definition of the scope of individual guarantees. ¹¹⁷

He notes that this is especially true for social and economic rights, rendering constitutional provisions particularly problematic as a source of fundamental rights in the context of Community law. This interpretation applies equally to domestic provisions that outline language rights, discussed *infra*.

It is not realistic to expect identical protective mechanisms throughout the Member States, given the nature of constitutions, which "...are not mere copies of a universalist ideal [but] also reflect the idiosyncratic choices and preferences of the constituents [as] the highest legal expression of the country's value system." ¹¹⁸ This becomes problematic, however, when particular rights are either protected weakly by, or excluded altogether from, one or a number of constitutions. Reconciling the varying standards of protection that can be guaranteed in respect of any given fundamental right has long been an issue of controversy in the Court's case-law and in related academic commentary. A Commission communication issued in 1976

¹¹⁶ John A. Usher, "Principles derived from private law and the European Court of Justice", (1993) 1 *European Review of Private Law*, 109-136 at 118, citing Advocate General Dutheil de Lamoignon in *Internationale Handelsgesellschaft*, *supra* note 69, at 1146-7.

¹¹⁷ Dausies, *supra* note 58, p. 407; *c.f.* also, O'Leary, *supra* note 65, pp. 373-4.

recommended that where standards of protection differed in Member State constitutions, the constitutional provision which offered the greatest level of protection for the individual should be drawn from as the basis in EC law of any fundamental right.¹¹⁹ Dausès is critical of this approach, however, arguing that linking the protection of fundamental rights in the Community to Member State laws in this way challenges the legitimacy of the autonomous Community legal order.¹²⁰ Attempting to extract a common position from discordant provisions also presents the converse danger that the Court might implement what it has gleaned to be the *lowest* standard of protection. Krogsgaard considers that, in practice, the jurisprudence of the Court has fluctuated between these approaches.¹²¹

A related issue is the number of constitutions that must provide for a fundamental right before it will be applied in the Community context. Advocate General Warner, in the *IRCA* decision, considered that protection of a fundamental right in just one Member State constitution was sufficient to trigger its incorporation into Community law.¹²² Coppel and O'Neill point out that this position was ignored in subsequent decisions of the Court; Weiler and Lockhart assert that it was rejected implicitly in *Hauer*, where the view that infringement of fundamental rights in the Community context can only be assessed by reference to Community, not national, law was reaffirmed.¹²³ The anomalous reliance by the Court on the often diverse Member State understandings of various rights, as a source of inspiration for uniform

¹¹⁸ Bruno de Witte, "Community law and national constitutional values", (1991-2) *Legal Issues of European Integration*, 1-22 at 7.

¹¹⁹ EC Bull. Supp. 5/76, p. 16.

¹²⁰ Dausès, *supra* note 58, p. 408.

¹²¹ Krogsgaard, *supra* note 77, pp. 105-107.

¹²² Case 7/76 *IRCA* [1976] ECR 1213 at 1237.

¹²³ Coppel and O'Neill, *supra* note 75, p. 685; J.H.H. Weiler and Nicolas JS Lockhart, "'Taking rights seriously' seriously: The European Court of Justice and its fundamental rights jurisprudence", (1995) vol. 32:1; vol. 32:2 *Common Market Law Review* 51-94; 579-627 (Part II, p. 596); Case 44/79 *Hauer* [1979] ECR 3727; Phelan, however, refers to theorists who maintain that the *IRCA* position remains valid: *supra* note 76, p. 674 (footnote 23).

Community interpretation, seems, in this context, potentially ineffective and politically divisive, given the inevitable selection process that will ensue.

The conflicts that have arisen between Community and Member State interpretations often reflect the collision of moral and economic values. Clapham argues that the Community should be tolerant of moral diversity among its Member States, warning that if the Court began to address sensitive issues like divorce and abortion, "...rights might no longer be handy tools for integration but vehicles of division and disintegration."¹²⁴ Absolute harmonisation of moral values is both unwise and unnecessary. But the acceptance by states of certain minimum moral standards has been the *raison d'être* of all international human rights instruments. It is, therefore, unrealistic to expect that the EC should accept anything less in its fundamental rights regime. A particular problem within the EC context is that the Court has traditionally pre-empted the political process, developing fundamental rights theory and practice for the Community before these developments were formally accepted by the Member States, as political architects of the EC. The resulting suspicion was heightened further over the years, as the Court began to probe Member State actions that were arguably linked only tenuously to the application of Community law.

The perceived subordination of fundamental constitutional values has sparked virulent debate among academic commentators, most notably the accusation that the Court of Justice does not take its fundamental rights jurisdiction seriously.¹²⁵ The various interpretations of the decision in *S.P.U.C. v. Grogan*¹²⁶ demonstrate the particular controversy surrounding the Court's attempt to balance conflicting concerns in cases of derogation from the Treaty provisions.¹²⁷ But this debate reflects

¹²⁴ Clapham, *supra* note 59, p. 311.

¹²⁵ Coppel and O'Neill, *supra* note 75; Weiler and Lockhart, *supra* note 123; Phelan, *supra* note 76, refers to the 'chasm' that exists between EC and Member State perceptions of fundamental rights and values (at 680-1); O'Neill, *supra* note 74, pp. 84-87 outlines the principled and pragmatic theories on the development of fundamental rights.

¹²⁶ Case C-159/90 *S.P.U.C. v. Grogan* [1991] ECR I-4685.

the broader controversy over EC/Member State competence boundaries, complicated by the overt clash of values as well as legal and political structures. Phelan recommends modification of the "...exceptionless supremacy doctrine...", giving precedence to adjudications by national constitutional courts on "...basic principles concerning life, liberty, religion and the family..." while maintaining the supremacy of EC law for economic and social rights.¹²⁸ He considers that this teleological approach conforms especially well with the principle of subsidiarity, enshrined in the EC Treaty and analysed in Chapter 3 *supra*. It does not, however, overcome the critical point raised in Chapter 3, that the Member States flinch consistently from the very entity they *themselves* have created and over which they maintain executive control. It is nonsensical that the Member States transfer competences to the EC and yet recoil from their subsequent implementation. It was acknowledged that the process of integration has often superseded its political codification but it must be remembered that the political map of the Community remains in the hands of the Member States. The EC does *not* control its own destiny. Fishman stresses this truth, stating that "[s]uprastate organisations...are originally and basically the creatures of states. As such, these organisations are rarely, if ever, strong enough to impose their own will on the strongest of their own creators."¹²⁹ The gulf that exists between according competences to the EC and accepting their implementation at supra-national level reflects a far broader Member State uneasiness. These tensions are particularly exacerbated in the fundamental rights domain, given the clash of deeply rooted national values with fledgling Community versions, the contingent threat to national sovereignty, the uncertain scope of fundamental rights within the Community legal order and the inevitable reaction of mainly civil law Member States to what has amounted to far-reaching judicial activism, more usually associated with the common law tradition. Weiler and Lockhart argue, however, that "...human rights

¹²⁷ Coppel and O'Neill, *supra* note 75, pp. 685-689; Weiler and Lockhart, *supra* note 123, pp. 597-605; Phelan, *supra* note 76; Gráinne de Búrca, "Fundamental rights and the reach of EC law", (1993) 13 *Oxford Journal of Legal Studies* 283-319.

¹²⁸ Phelan, *supra* note 76, pp. 688-9.

¹²⁹ Joshua Fishman, "On the limits of ethnolinguistic democracy", in Skutnabb-Kangas and Phillipson (eds.), *supra* note 2, 49-61 at 51.

issues do not necessarily pit the Community against Member States: human rights issues typically will pit the individual against public authorities [rendering] artificial in many instances the notions of Member States v. Community institutions.”¹³⁰

Language rights empower the individual against public authorities in exactly the sense discussed by Weiler and Lockhart. But the political resistance usually evident in the context of modifying EC language policy is especially ironic, given that language rights encapsulate diversity rather than harmonisation. It was shown in Chapter 1 *supra* that Member States have expressed genuine concerns in respect of the harmonising effect of intensifying European integration. It was argued that policies based on recognition of the value of diversity, particularly in respect of languages, were needed to counteract that momentum. Granting language rights at EC level, however, necessarily calls domestic policies into question, in that the EC could potentially force a Member States to focus on and change how it treats its citizens in respect of choice of language. This perceived ‘interference’ by the Community would most likely be viewed as an unwelcome challenge to national sovereignty, quite apart from the promotion of individual rights. Thus, it is arguable that, from the political perspective, Member States are not concerned primarily with furthering the interests of the individual, but are resistant to obligations under which they might yet be placed, in a manner similar to earlier distrust of EC involvement in the social rights sphere. The development of diversity-based rights could, therefore, become an unfortunate casualty of a broader reluctance to submit to EC jurisdiction at the controversial fringes of the fundamental rights domain. In Chapter 2 *supra*, it was argued that the weakly reasoned decision in *Groener* was, in reality, a veiled promotion of diversity, since the Court did not have an appropriate Treaty provision, such as Article 128 EC, to draw from at that time. The Court formed a highly questionable connection between teachers and language behaviour to uphold Irish Government language policy, which suggests that the Court of Justice is in favour of maintaining linguistic diversity within the Community. It was acknowledged, however, that decisions relating to labelling of consumer products often appear to

conflict with the promotion of regional languages. It is strange that a Court which has at times gone out of its way to promote linguistic diversity would not have taken this factor into consideration in other cases that raised language issues, discussed in Chapter 1 *supra*. This anomaly demonstrates even further the need for explicit clarification of the Community's stance on language policy as a fundamental rights issue.

To alleviate Member State discomfort with judicial activism and to strengthen the position of the individual, it has been often been suggested that the Community should draw up a catalogue of enumerated fundamental rights. This might settle Member State anxieties to a greater extent, but would also, more importantly, provide clarity for individuals as to what level of protection for which rights can reasonably be expected from the EC. Dausès has raised concern, however, that the attainment of consensus on the content of any catalogue is unlikely, given the inherently controversial nature of economic and social rights; he warns against accepting the lowest common denominator of agreement as a compromise.¹³¹ This, he argues, would devalue the efficacy of the existing system developed by the Court of Justice. Clapham advances similar arguments, advocating that the perspective that should be considered in determining the content of an express declaration of rights is that of the victim.¹³² The difficulties associated with achieving consensus cannot be underestimated but nor should they be overstated. The Court of Justice already undertakes to divine both the content and extent of fundamental rights within the Community legal order from a diverse and, as outlined, problematic range of sources. The results of this process have at times aggrieved the Member States, who might actually welcome the chance to determine these issues at the political level instead. Moreover, the ratification of every international fundamental rights instrument has been preceded by political negotiations, usually between states far more diverse than

¹³⁰ Weiler and Lockhart, *supra* note 123, p. 621.

¹³¹ Dausès, *supra* note 58, p. 416.

¹³² Clapham, *supra* note 59, p. 366.

the Member States of the EC. It may, therefore, be premature to discount their ability to negotiate a meaningful fundamental rights catalogue for the Community.

Other possible actions include improving the *locus standi* of individuals for EC law purposes, extending justiciable fundamental rights protection to all policy areas covered by the Union and improving EC/Council of Europe co-operation.¹³³ As it stands, the fundamental rights jurisdiction of the Community is characterised by uncertainty. Tackling these issues directly would constitute a marked challenge to the political sensitivities of the Member States. De Búrca stresses, however, that any attempt to eschew political controversy could damage the legitimacy of the Community and the Court in the long run, as it would merely perpetuate contemporary incoherence.¹³⁴ The way in which Community competence in the fundamental rights domain evolves in the future is of crucial importance in contexts such as language rights, which are not usually linked to the more traditional applications of EC law. Potential developments are assessed *infra* in two contexts: first, dealing with the EC as an entity, which also encompasses the development of existing citizenship rights and, second, the possibility that the EC may yet influence the protection of fundamental rights in the Member States in a broader sense. Overall, the Court cannot succumb deferentially to the controversies of the political arena. The broader issue of competence delimitation is essentially a Member State concern: it is the Member States, as architects of the Community's constitutional structure, that can limit or extend Community powers, including those of the Court. What must concern and motivate the EC in respect of fundamental rights protection are the concerns of the *individuals* throughout the Community.

E. Language Rights in the Member State Constitutions

The constitutional provisions enacted by the Member States in respect of minority languages are listed in Appendix I. The various degrees of protection evident can be considered within the Skutnabb-Kangas/Phillipson paradigm of state responses to

¹³³ O'Leary, *supra* note 65, pp. 372-376.

minority language group needs, set out at the beginning of this Chapter. These range from tolerance (essentially, tolerance of the private use of the language but no provision for official use *e.g.* France) to non-discrimination/permission (*e.g.* Italy, the United Kingdom in respect of Welsh) and maintenance-oriented promotion (*e.g.* Ireland, Spain).¹³⁵ Significantly, Capotorti, as UN Special Rapporteur, declared that international protection of minority rights is *not* contingent on their domestic recognition.¹³⁶ Thus, while the EC *may* draw from domestic provisions on language rights, the absence of such provisions is not inherently fatal to the development of Community policies. Notwithstanding the diversity of the measures listed, the vast majority of Member States have made some provision for the recognition of linguistic minorities based within their territories. Fishman observes that the number of languages officially recognised world-wide has risen from thirty to three hundred in the twentieth century alone, ironically, alongside the rapid spread of English as a world-wide *lingua franca* for "...econotechnical, political, diplomatic, educational and touristic purposes...."¹³⁷

The study of domestic provisions on language rights is an essential prerequisite to the formation of successful international measures, particularly given the diversity of language groups affected, in turn requiring diverse regimes of protection, as discussed *supra* in the context of the Charter for Regional or Minority Languages. Furthermore, securing the implementation of domestic measures is essential to the

¹³⁴ De Búrca, *supra* note 127, p. 294.

¹³⁵ The original model of state response to language policy was developed by Ostrower *i.e.* (1) legal equality of national languages for all practical and official purposes; (2) legal equality of all national languages, some of which are designated as official; (3) formal equality of national languages conditioned upon doctrinal considerations and changing official policies; (4) supremacy of the language of the dominant national grouping, the official state language, within a system of constitutional protection of linguistic minorities; (5) recognition of a foreign language as an auxiliary official language and (6) designation of one or more native tongues as the official form of state expression: Alexander Ostrower, *Language, Law and Diplomacy*, (Philadelphia, Oxford: University Press, 1965), p. 597.

¹³⁶ Capotorti Report, *supra* note 5, p. 121, para. 61.

¹³⁷ Joshua A. Fishman, *Language and Ethnicity in Minority Sociolinguistic Perspective*, (Clevedon: Multilingual Matters Ltd., 1989), p. 220.

enforcement of effective, relevant language rights, since their exercise in the context of the official use of language is usually confined to communications with national authorities. The development of language rights for citizens dealing with the EC is, however, a legitimate objective, discussed *infra*. In addition, international action can influence internal state practice in a positive sense, persuading states to undertake obligations that they would not have assumed independently. Diverse societies that have incorporated the reality of difference into their constitutional and legislative structures (e.g. Switzerland) represent the relative success in practice of the unity in diversity ideal, towards which the EC now strives, far more than societies that maintain an artificial policy of homogenous national unity (for example, cf. Chapter 1 *supra* on the 'English-only' controversy in the United States).

4. LANGUAGE RIGHTS AND THE EVOLVING PERSPECTIVE ON EC FUNDAMENTAL RIGHTS PROTECTION

The phrase 'fundamental rights' embodies an array of rights, duties and protection mechanisms, varying in both content and degree. Clapham advocates that the EC must adopt this wide vision of fundamental rights, asserting that the Community's traditional concentration on a limited range of rights is no longer sufficient.¹³⁸ The diverse commentary discussed throughout this Chapter converges on this point, arguing that the motivation behind EC involvement should be reassessed in terms of the rights of individuals. It is also feared that, at present, balancing fundamental rights with the objectives of the Community can result in the demotion of both international and domestic standards and values. It was shown in Chapter 2 *supra* that the Community has long been aware of the rights and needs of speakers of minority languages, largely due to the work of the European Parliament. The Court has also recognised that national policies aimed at the protection and promotion of minority languages are potentially compatible with EC law.

¹³⁸ Clapham, *supra* note 59, p. 310.

The EC institutions have made concerted efforts in recent years to demystify the Community, stressing its relevance to every individual citizen, projecting an image of accessibility and striving to emphasise the wide-ranging benefits of EC membership. It is difficult, however, to avoid the cynical proposition that these declarations amount to little more than hollow rhetoric, a demystification in form rather than one of tangible substance. If the Community fails to evolve in accordance with the image it has designed for itself, there will be a high price to pay in terms of legitimacy and credibility. The pragmatic contribution that the EC can make to fundamental rights protection is, therefore, crucial and is now assessed in the context of language rights. There are two relevant domains for potential action, policies for the Community as an entity and Community influence on Member State practice.

A. Language Rights when Dealing with the Community as an Entity

The Amsterdam Treaty proposes that Article 8d EC should be amended, to formalise constitutionally the principle that when a citizen of the Union writes to any of the institutions in any of the official languages listed in Article 248 EC (as well as Irish), s/he is entitled to receive an answer in the same language. This procedure exemplifies how EC language policy relates directly to individual citizens as well as to the internal administration of the Community. It relates to the broader domain of the official use of languages, which covers communications, both written *and* oral, with public authorities or institutions, including the courts and the civil service. The concession made to EU citizens is, therefore, fairly narrow when considered in this broader context. Moreover, although based on the premise of linguistic choice for the citizen, over fifty million EU citizens have been excluded, as speakers of languages other than the official languages of the Community. The revocation of this illiberal facet of citizen/Community relations would constitute an innovative development of the EC fundamental rights regime. It reflects a victim/beneficiary oriented motivation for fundamental rights protection, confirming that the EC has a proactive mandate apart from its incidental, reactive concentration on rights connected solely to the implementation of fundamental Community law. Furthermore, an inclusive language policy consolidates the language rights protected by many national and international

legal instruments. The Court of Justice has long recognised the limitations of existing fundamental rights instruments, such as the ECHR, and has stated its intention of going further where the EC could offer greater protection for individuals. A re-examination of citizenship rights from the perspective of language use would mark a definitive step in this direction.

The official use of language is discussed by Réaume in the context of the linguistic security thesis.¹³⁹ She considers, on the one hand, that most people rarely, if ever, come into contact with a court or legislature; this can be applied equally to the low probability that citizens will contact any of the EC institutions or be involved directly in EC litigation.¹⁴⁰ Viewed in these terms, based solely on the frequency of occurrence or usage, Réaume concludes that the inability to carry out such functions in one's own language is hardly a threat to linguistic security. But in the context of language rights as fundamental rights, the official use of language has far broader implications. It is a domain over which the governments of states, or the institutions of other entities, have absolute authority, where they can implement the principle of linguistic choice to both practical and symbolic effect. De Witte expresses the argument in bald financial terms, arguing that the provision from public money of official services in the majority language means that "...the money of the members of a linguistic minority contributes to providing a service which is culturally optimal for the majority alone."¹⁴¹ Significantly, a considerable proportion of the Court of Justice's case-law relates to administrative and procedural issues, demonstrating the practical relevance of the official sphere to litigants.¹⁴²

¹³⁹ Réaume, *supra* note 1, pp. 51-4.

¹⁴⁰ As outlined in Chapter 1 *supra*, for court proceedings in a Member State which are being conducted through the medium of a language other than those recognised by the EC's official languages regime (or Irish), a reference made to the ECJ under Article 177 EC must be translated into one of the official Community languages, notwithstanding the language of the case.

¹⁴¹ Bruno de Witte, "Le principe d'égalité et la pluralité linguistique", in Henri Giordan (ed.), *Les Minorités en Europe: Droits Linguistiques et Droits de l'Homme*, (Paris: Éditions Kimé, 1992), 52-64 at 57-8.

The rules and procedures governing language use for communication with the Community institutions, both oral and written, should be extended to apply equally to speakers of minority languages, as an expression of respect by the EC for fundamental language rights. This proposition is a practical manifestation of the theoretical issues set out in Chapter 1 *supra*. A more streamlined language policy was recommended for the internal administration of the institutions, on the basis that effectiveness and efficiency can be hampered by linguistic complexity; moreover, those working in the administrative system have essentially chosen that function, aware of any linguistic requirements imposed at the appointment stage. Amendments to the present languages regime would, however, have to be strictly limited to internal communications and, furthermore, provision should be made for situations where individuals require interpretation and/or translation facilities. Procedures of external application, such as the translation of EC legislation into all of the official languages, would not be affected. The language rights of individual citizens cannot, however, be compromised on the basis of efficiency. In any event, the relative infrequency of communications between citizens and the EC institutions would not generate prohibitive costs; furthermore, translation and interpretation could be undertaken by associate service providers, instead of requiring personnel for every minority language on stand-by in a centralised office. Not every minority language spoken in the EC Member States would qualify for inclusion into the scheme *e.g.* languages with a prohibitively low number of speakers could be legitimately excluded. But clear and objective guidelines would have to be devised. The European Bureau for Lesser Used Languages, for example, is ideally placed to undertake this task, on a consultative basis with the language communities themselves. Fishman sets out the acceptability of limits in any linguistic regime, but he also expresses concern that “[t]hose who wield greater power are particularly likely to have a disproportionate say in the establishing of such limits.”¹⁴³

¹⁴² *cf.* Dausès, *supra* note 58, pp. 403-4.

¹⁴³ Fishman, *supra* note 129, p. 51.

An inclusive right to choice of language may be implied, albeit accidentally, into a Regulation on migrant workers. Article 48(1) of Regulation 574/72 provides that a claimant for certain social security benefits is entitled to have any decisions of the authorities, *both Community and national*, notified to him "...in his own language...": significantly, there is no express restriction to the official Community languages.¹⁴⁴ It is arguable, therefore, that a migrant worker who speaks a minority language is entitled to receive notice in that language, given the absence of any requirement to the contrary. De Witte points out that the application of this EC procedure would in turn affect practices in the public authorities of Member States.¹⁴⁵ But the enjoyment of administrative language rights should not be dependent on exercising the right to mobility; nor should it be limited to the application of a specific regulation.

It is particularly appropriate that the EC, in the context of Article 8d, has considered language rights within the remit of citizenship. The definition of citizenship can vary, depending on the nature of the political entity in question, but its central theme relates almost invariably to the role, based on both rights and duties, of the individual within a polity. Preuß outlines the historical development of citizenship, tracing its evolution from the passive submission of governed citizens to the more inclusive version within democratic theory, developed in the last two hundred years.¹⁴⁶ The concept of European citizenship can be traced from early discussions in the Tindemans Report on European Union to its eventual formulation in Article 8 EC, introduced by the TEU.¹⁴⁷ The general view among academic commentators is that Article 8 grouped together a number of existing, movement-oriented rights but did not introduce anything particularly new into the Community legal order. This seems

¹⁴⁴ [1972] OJ L-74/1 (emphasis added).

¹⁴⁵ De Witte, "The scope of Community powers in education and culture in the light of subsequent practice", in Roland Bieber and Georg Ress (eds.), *Die Dynamik des Europäischen Gemeinschaftsrechts*, (Baden-Baden: Nomos, 1987), 261-278 at 266.

¹⁴⁶ Ulrich K. Preuß, "Problems of a concept of European citizenship", (1995) vol. 1:3 *European Law Journal*, 267-281 at 268-9.

to have been recognised by the drafters of the Maastricht Treaty themselves, given the dynamic nature of Article 8e, which empowers the Council to strengthen, but not detract from, the rights laid down in the provision.¹⁴⁸ One feature of citizenship that is not linked inherently to free movement is the right of citizens to petition either the European Parliament (Article 8d) or the Ombudsman established by Article 138e. The European Parliament has, however, submitted to the individual's right to petition since 1953, on its own initiative. The proposed Amsterdam Treaty amendments to Article 8 make clear the already implicit understanding that EU citizenship is complementary to, and in no way supersedes, national citizenship. European citizenship is, therefore, widely viewed as a symbolic gesture rather than a substantive embodiment of fundamental rights in a broader sense, a strategic enhancement of the legitimacy of the European Union rather than of the rights of the individual citizens concerned.¹⁴⁹

A model of European citizenship that incorporates fundamental rights is far more desirable. The protection of language rights, including minority language rights, within a reformed framework is particularly advocated and is legitimated *infra*. But an ongoing debate in the context of citizenship and rights must first be addressed *i.e.* whether according rights to citizens can be justified given the resultant exclusion of non-national residents. This applies to citizenship rights in particular but also to the enjoyment of fundamental rights in general. It relates equally to state citizenship but is examined here in the context of the EC. It centres on a perceived shift from humanity to nationality as the basis of individual rights.¹⁵⁰ Closa argues that citizenship and fundamental rights were *not* conjoined in the TEU for precisely this

¹⁴⁷ Carlos Closa, "The concept of citizenship in the Treaty on European Union", (1992) 29 *Common Market Law Review*, 1137-1169 at 1141-1153; David O'Keefe, "Union citizenship", in O'Keefe and Twomey (eds.), *supra* note 61, 87-107 at 87-89.

¹⁴⁸ Jessurun d'Oliveira, however, views this dynamic process as a front for lack of coherence within the citizenship provisions: Hans Ulrich Jessurun d'Oliveira, "European citizenship: Its meaning, its potential", in Renaud Dehousse (ed.), *Europe After Maastricht: An Ever Closer Union?*, (Munich: Law Books in Europe, 1994), 126-148.

¹⁴⁹ *cf.* Gráinne de Búrca, "The quest for legitimacy in the European Union", (1996) vol. 59:3 *Modern Law Review* 349-376.

reason, so that third country nationals resident in the Member States could still benefit from the Community's fundamental rights regime.¹⁵¹ However, concerns expressed at the reservation of rights and privileges for citizens as a class do not take into account either the universalism of inherently 'human' rights or the legitimacy of recognising degrees of fundamental rights. The fact that "...citizenship should trigger the obtaining of some rights which are not enjoyed by everyone (that is, by any person simply as a human being)..."¹⁵² is widely recognised and does not in any way diminish the universalisation of *human* rights *e.g.* the rights to life and liberty. What is essential is that rights accorded to citizens should only come from a limited catalogue of procedural or administrative rights. The enjoyment of language rights provides a clear example of how additional benefits granted to citizens are a legitimate expression of their distinct relationship with both Member States and the EC: language rights granted on the premise of linguistic choice can be justified on the basis of that relationship, while the universal principles of language rights based on natural justice still ensure a basic level of protection for third country nationals where required.

The development of citizenship to accommodate diversity is advocated strongly by Jessurun d'Oliveira:

It is a clear indication of a phenomenon which is also to be observed in the component parts of the European Community: that the Member States have to a large extent become multicultural and multiethnic societies which may be bound together not by a set of common values, but the development of a competence to deal with their differences; indeed the re-definition of political institutions in Europe reflects this mutation. It is this competence to deal with differences which may be the nucleus of modern active citizenship, and

¹⁵⁰ O'Neill, *supra* note 74, p. 86.

¹⁵¹ Closa, *supra* note 147, pp. 1153-1157; O'Leary argues, however, that while third country nationals are not excluded from the application of Article F(2) TEU in theory, they are excluded in practice, given that fundamental rights in Community law are only protected as "...by-products of the four freedoms": O'Leary, "The relationship between Community citizenship and the protection of fundamental rights in Community law", (1995) 32 *Common Market Law Review*, 519-554 at 530. This statement presupposes, however, that EC law itself is confined to the four freedoms, not taking other fundamental principles into account *e.g.* equal pay for equal work in the context of gender.

¹⁵² Koen Lenaerts, "Fundamental rights to be included in a Community catalogue", (1991) vol. 16:5 *European Law Review*, 367-390 at 384.

The imminent expansion of the European Union, incorporating the newly emerging democracies of Eastern Europe, recasts this projected development as an absolutely necessary inevitability rather than a merely desirable aspiration. The need for reformation of the Community legal order in this way reflects the concurrent reconstitution of democratic theory to encompass the needs of minorities, discussed in Chapter 1, in view of the fact that traditional liberal democratic structures "...treat minorities as sets of outvoted individuals."¹⁵⁴ Contemporary awareness by governing entities of the need for representation of *all* individuals, and perhaps some groups, is replacing the simplistic 'majority rules' tenet of liberal democratic theory. This is further reflected by the gradual displacement of a benign concept of tolerance in favour of a proactive approach to non-discrimination, involving the implementation of corrective policies where appropriate. The nation-state model of governance has been gradually eroded but not because of the rejection of nationalist philosophy in a broad sense, as predicted by proponents of European integration. In fact, phenomena such as attachment and identity, usually associated with nationalism, are more rather than less prevalent in contemporary society. What has been displaced is the primacy of the nation-state as the polity best positioned to embody attachment and identity. Nation-states have been shown to encapsulate a largely artificial sense of homogeneity. The success of future models for political entities is dependent on their ability to channel and accommodate diversity.

Any polity based on representation and participation will have to incorporate fundamental rights in general and may justifiably develop certain rights dependent on citizenship, to maximise protection for the individual (and possibly groups) against governing institutions. The denial of fundamental rights is a denial of the dignity and humanity of the individuals concerned. The denial of fundamental rights based on citizenship is a denial of effective participation and representation. This applies

¹⁵³ Jessurun d'Oliveira, *supra* note 148, pp. 147-8.

equally to language rights, particularly minority language rights, because “[w]hen a substantial minority of a population is denied full effective citizenship because of the language they speak, then language and language rights matter.”¹⁵⁵ This principle has been recognised within Community quarters for some time. The Intergroup on Minority Languages in the European Parliament succeeded, for example, in having a reference to lesser used languages included in the Parliament’s Report on Union Citizenship, prepared for the Maastricht Intergovernmental Conference.¹⁵⁶ The tentative recognition of language rights in the proposed amendment to Article 8d EC demonstrates continuing awareness of effective participation by the EC. It is also evident, from the Draft Text on Union Citizenship submitted by the Commission prior to the Maastricht IGC, that the Community is aware of how much further it will need to go in the future. The Commission proposed the inclusion of the following article into the TEU: “[e]very Union citizen shall have the right to cultural expression and the obligation to respect cultural expression by others.”¹⁵⁷ The explanatory memorandum accompanying the draft article stated that the right to cultural expression was a corollary of the new Community competence in the field of culture, outlined in Article 128 EC, and was grounded in the dignity and diversity of individuals. O’Keefe has also interpreted citizenship as encompassing rights based on culture, as well as consumer, education, health and environmental rights, in line with other constitutional developments in the Maastricht Treaty.¹⁵⁸ An open-ended provision such as that proposed by the Commission could easily be interpreted as placing reciprocal duties on the Community, however, imposing obligations for which the Member States were probably not ready at that time. But the concept of respect for diversity has taken firm root in the interim; it is unrealistic to allow the Community to continue to express ideals that are not followed through with definitive action. The Amsterdam Treaty mechanism for responding to citizen

¹⁵⁴ Freeman, *supra* note 27, p. 26.

¹⁵⁵ Ó Riagáin and Nic Shuibhne, *supra* note 8, p. 12.

¹⁵⁶ (1994) vol. 11/12 *Contact* 1.

¹⁵⁷ Bull. EC Supp. 2/91, 85-88 at 86.

¹⁵⁸ O’Keefe, *supra* note 147, p. 90.

communications, although limited to official Community languages, does at least signal that the EC is prepared to explore ways in which its established commitment to linguistic diversity can be implemented in practice. Again, the sensibilities of Member States, compounded by disinclination within some of the EC institutions, are often prohibitive to further policy development, as discussed further in the next section. But Marias predicts that rights such as the seemingly abandoned right to cultural expression could well be realised in the future, as the dynamic concept of Union citizenship evolves in accordance with the evolution of the contemporary political reality.¹⁵⁹ O'Leary considers that the future of citizenship is largely dependant on the establishment of an effective relationship between citizenship and fundamental rights, not based on the present understandings of either concept but on an advocated development of both.¹⁶⁰

In summary, the EC must consider fundamental rights in a broader context than the conditional link to the application of Community law. Rights that relate to its administration as an entity are an obvious starting point; their implementation would serve a dual purpose; first, examining the protection of rights from the perspective of the requirements of individuals and, second, redressing the democratic and legitimacy deficits faced by the EC as an international legal order. Amendment of the proposed Article 8d to cover communications in minority as well as official Community languages is a pragmatic and symbolic possibility for the substantive implementation of what have remained theoretical ideals to date. It would not place undue demands on resources, particularly in the context of a reformed EC language policy more generally, but would amount to a remarkable step in the recognition of minority language rights as fundamental rights. It also accords well with the general principles of citizenship, in its dynamic, evolving sense, in the context of contemporary political theory on effective participation. But the EC may have even greater influence as a catalyst for change at Member State level, discussed *infra*.

¹⁵⁹ Epaminondas A. Marias, "From Market citizen to Union citizen", in Marias (ed.) *European Citizenship*, (Maastricht: European Institute of Public Affairs, 1994), 1-24 at 17.

¹⁶⁰ O'Leary, *supra* note 151, 539-40.

B. EC Influence on Member State Policies: 'Aspiration Rights'

The complex relationship between the EC and its Member States has been interwoven with specific language-related questions throughout this thesis. From subsidiarity and competence division to EC protection for fundamental rights, the schizophrenic reactions of the Member States, as both donors and subjects of Community powers, have at times been exposed as unfounded and counterproductive. This section, however, seeks to examine the positive aspects of this interrelationship. The realisation of minority language rights at Member State level is often characterised by disappointment, from the perspective of minority language speakers. The preceding section discussed how the EC can implement inclusive language rights in the context of citizen/Community relations, but Argemi has stressed that the realisation of language rights at inter-state level in the absence of effective domestic policies would be "...a dishonest display."¹⁶¹ But is Member State reluctance to provide for the rights of linguistic minorities a matter of any concern for the Community? It was shown that the Council of Europe has had tremendous difficulty in securing state support for the European Charter for Regional or Minority Languages. In this context, it seems unlikely that the EC could induce such a contentious inroad into national sovereignty where the Council of Europe could not. Moreover, the Court of Justice can only review Member State acts on fundamental rights grounds where the Member State has acted in the implementation of EC law. The principle of non-interference by the Community in the internal treatment by Member States of their nationals, apart from limited circumstances related to the principle of reverse discrimination, is also relevant. In *Mutsch*, discussed in Chapter 2 *supra*, the Belgian authorities were required to grant to a non-national the same language rights provided for nationals, but the Court did *not* have jurisdiction to demand, for example, that the authorities apply more extensive rights than those already enacted by the domestic legislature. The possibilities for EC involvement in this aspect of fundamental rights are, therefore, presented in terms of potential rather

¹⁶¹ Aureli Argemi, "European recognition for Catalan", (1991) vol. 8:1 *Contact* 6.

than existing competence and would require explicit constitutional change to become effective.

The framework for EC rights protection devised by Lenaerts is used as a theoretical basis for this section; it is grounded in the thesis that “[t]he central protection of fundamental rights in a composite legal order should shield the citizens not only in their relationship with the institutions of that legal order itself, but also in their relationship with its component entities.”¹⁶² Lenaerts first asserts that the application of the ECHR in areas of residual Member State power should be guaranteed, free from EC interference. The EC would claim “...some specific responsibilities for the protection of fundamental rights which are not enumerated in the ECHR, even if those rights somehow related to the residual powers of the Member States.”¹⁶³ It is acknowledged, however, that this could only take place as a result of “...a deliberate political choice during the process of making or amending the Community constitution.”¹⁶⁴ For this reason, the advocated development of EC competence is purely an aspiration, forming the outer layer of the concentric circles framework developed by Lenaerts. The nucleus of rights protection is constituted by implementation of the ECHR, leading outwards, on the concentric circles model, to general principles of law, fundamental rights based on Union citizenship and, finally, aspirational fundamental rights, particularly social and cultural rights.¹⁶⁵ Fundamental rights drawn from the ECHR and from general principles of law already form the basis of the existing jurisprudence on rights protection within the EC legal order. Lenaerts stresses that the integrity of the ECHR system must be guaranteed, but he also acknowledges the aim of guaranteeing higher standards of protection where possible.

¹⁶² Lenaerts, *supra* note 152, p. 368.

¹⁶³ *ibid.*, p. 375.

¹⁶⁴ *ibid.*, p. 376.

¹⁶⁵ *ibid.*

Turning to aspiration rights, Lenaerts groups together rights related to culture, social and economic policy, the environment and consumer issues, on the basis that their enumeration is meaningless without proactive intervention by public authorities.¹⁶⁶ He then argues that effective protection of rights within this category requires the express division of competence among competing public authorities since, in the EC/Member State context, "...silence about the respective responsibilities of the Community and the Member States...leads to a black hole in the Community's constitution."¹⁶⁷ In Chapter 4, it was shown that Article 128 EC sheds little light on EC competence in the field of culture. A proposed amendment to Article 128(4) in the Amsterdam Treaty makes explicit, however, the implied role of the EC in the maintenance rather than suppression of the diversity of cultures. It can be assumed that this applies equally to minority cultures, in the absence of any indication to the contrary and aggregating the promotion of minority languages by the European Parliament and the Court of Justice. But the fact remains that the limited possibilities for Community action under Article 128 EC do not correspond with the needs of minority language speakers in the context of the corollary duties of public authorities.

The primary responsibility for implementing the rights of minority language speakers lies with national authorities, who control policy for the administration of domestic courts, civil service authorities, education systems, *etc.* Lenaerts combines this responsibility with the development of a new competence for the EC, as "...the supervisory structure for the protection of fundamental rights in areas which substantively continue to belong to the sphere of powers of the Member States (and without the Community itself having any specific normative power in this respect)."¹⁶⁸ This latter aspect of aspirational rights should appease Member States who are reluctant to accept any role for the Community in such matters. It also conforms with Article 128 EC, which envisages the EC as co-ordinator rather than lawmaker. The fact that substantive policies would not necessarily emanate from

¹⁶⁶ *ibid.*, p. 386.

¹⁶⁷ *ibid.*

centralised institutions also avoids the controversial balancing by the Court of Justice of an EC minority language policy *per se* against competing domestic provisions. Clapham elaborates on the possibilities for practical implementation, referring to "...imaginative solutions such as Community-wide collective agreements...and provisions which are adaptable to the various different legal systems...[that] go beyond attempts to harmonise or searches for convergence."¹⁶⁹ Non-harmonisation accommodates fully the very different needs of different language groups. Moreover, Member States would not be able to plead the erosion of cultural diversity in an attempt to evade consequential responsibilities. Zuanelli recommends that "[i]nterventions at the international level should define a threshold for these rights to be freely fostered and implemented by each country in accordance with its linguistic policy."¹⁷⁰ This relates back to the idea of developing minimum standards, discussed *supra* and in Chapter 4. But the EC would have to incorporate a protection mechanism for individuals into its role as supervisor of Member State initiatives. The level of discretion granted to states by the Council of Europe's Charter for Regional or Minority Languages arguably renders the Charter potentially ineffective from the perspective of the fundamental rights of speakers. This reflects the double-standard irony identified in Chapter 1 *supra*, summarised by Fishman: "[s]tates are not slow to apply to languages lower in the pecking order than the state-languages *per se* the very same notions of limits that the state languages are so unwilling to apply to themselves *vis-à-vis* the EC organisations' operations."¹⁷¹

Member State resistance may be overcome as part of a broader reform of EC language policy, when the full implications of *inclusive* linguistic diversity will have to be faced directly. But the role of the EC as supervisor of aspirational rights holds much potential from the perspective of individuals, given that primary responsibility is correctly placed on national authorities but alongside a complementary supra-state

¹⁶⁸ *ibid.*, p. 389.

¹⁶⁹ Clapham, *supra* note 59, p. 365.

¹⁷⁰ Zuanelli, *supra* note 57, p. 297.

¹⁷¹ Fishman, *supra* note 129, p. 55.

redress mechanism. Rights protected in this way would include those not protected by the ECHR, as well as more extensive protection for those already included therein. But realisation of this aspirational domain of fundamental rights will require changes not only in the constitutional structure of the Community but in its political culture as well as in the attitudes of the Member States. The achievement of these preconditions may not be quite so unrealistic as it seems, however, given that a similar role for the Community, albeit outside the fundamental rights domain, was envisaged and codified in Article 128 EC, discussed in Chapter 4 *supra*.

5. CONCLUSION

Clapham writes that “[o]ne cannot simply dismiss the concerns of states over the future of their language...as disguised protectionism. More satisfactory answers and attention could be given to such questions if the impoverished status of human rights in the Community legal order were improved.”¹⁷² Language rights are legitimate fundamental rights that impose enforceable correlative duties on public authorities. The protection of language rights can be derived from international instruments and constitutional provisions, both recognised as sources of fundamental rights by the Court of Justice, but the implementation of an effective right to choice of language for official purposes often remains elusive. The EC has a definite role to play in the development of language rights protection, in terms of its own status as a governing entity and in the context of its potential influence on the formation and implementation of Member State policy. Awareness of minority language rights has clearly informed the EC institutions for some time but this awareness must be translated into substantive results. In this way, the declared commitment to the protection of the individual, above and beyond existing standards, will be realised considerably, breathing life into the all too vacuous domain of political promises.

¹⁷² Clapham, *supra* note 59, p. 359.

CHAPTER 6

EVOLUTION OF EC MINORITY LANGUAGE POLICY: POST-MAASTRICHT AND AMSTERDAM

1. INTRODUCTION

Chapters 3, 4 and 5 explored changes in EC/Member State competence, cultural policy and the protection of fundamental rights by the Community, brought about by the Treaty on European Union and, more recently, proposed by the Amsterdam Treaty. The impact of these amendments on the capacity of the EC to participate in the formation and implementation of minority language policy was assessed and the following preliminary conclusions were drawn:

- the codification of subsidiarity in the EC Treaty reflects fundamental Member State concerns in respect of the constantly eroding borders between EC and Member State competence; it was argued, however, that even under a restrictive interpretation of subsidiarity, there are certain instances where the EC is the most appropriate actor in the language policy context, to redress the impact on language use of intensified European integration.
- Article 128 EC does not have the potential to justify a substantial EC minority language policy; its structure reflects a more limited, literal definition of culture; the cultural aspect of language is, however, a necessary component of any language policy, in the context of negative language rights based on tolerance and non-discrimination; Article 128 did, at least, place cultural issues, which are highly sensitive from the political perspective, firmly on the Community agenda; the ethos of the general objective outlined in Article 128(1) could yet be drawn upon independently of the other, more restrictive sections of the provision; significantly, the provision focuses on *diversity* of cultures, an aspect strengthened expressly by the Amsterdam Treaty.
- the protection of language rights as fundamental rights must feature in any future development of EC language policy; the initiation of policies for the Community

as a public entity, in respect of citizenship rights, and externally, in terms of influencing Member State policies, was advocated and justified.

In Chapter 2 *supra*, dealing with the pre-Maastricht era, it was argued that the Community institutions, while sympathetic, did not have the requisite legal competence to act decisively on minority language issues. The current position, summarised above, is radically different. This Chapter looks at how the institutions have addressed minority language questions in light of changed competence and an evolved political climate, examining whether any of the possibilities outlined above have been taken on board.

2. DEVELOPMENTS IN THE INSTITUTIONS: THE PARLIAMENT AND THE COMMISSION

A. Killilea Report (1994)

Resolution on Linguistic and Cultural Minorities in the European Community¹

In Chapter 2, the European Parliament emerged as the institutional champion of minority language rights. This work was consolidated further by the adoption of the Killilea Report on 9 February 1994.

(i) Background

Prior to the enactment of the Treaty on European Union, the Parliament's Committee on Culture, Youth, Education and the Media commissioned Mark Killilea MEP to prepare a report on minority languages. Mr. Killilea advanced three reasons as to why another report on lesser used languages was necessary: first, the resurgence of smaller nations and repressed communities in central and eastern Europe; second, the adoption of the Maastricht Treaty, which included a new Community competence in cultural affairs and, third, the adoption of the Charter for Regional or Minority Languages by the Council of Europe.² As with the Commission's report in 1986, a questionnaire format was devised; information was received not only from Member State governments but also from regional and local authorities, research institutes and

¹ [1994] OJ C-061/110; text in Appendix II.

² (1994) vol. 11:1 *Contact*, 1-4 at 2.

language associations. The Report was adopted by the European Parliament by a virtually unanimous majority on 9 February 1994.³

(ii) Content and Commentary

The lengthy Preamble recalls the Arfé and Kuijpers Resolutions, as well as referring to interim developments in the Council of Europe and OSCE on minority language protection. Paragraph A does not draw on Article 128 EC as a legal basis *per se*; rather, it speaks of the Parliament's taking 'encouragement' from the commitment to national and regional diversity therein. This commitment is later rephrased, however, as a Community *responsibility* (paragraph G). The Preamble goes on to set out the role of the EC in terms far stronger than those employed in any of the previous resolutions. In paragraph L, the Parliament restates the importance of financial contributions from the Community, but it refers also to *legal* protection at the supra-national level. Paragraph N represents an effort to placate political sensibilities while outlining Member State responsibilities, recognising that 'while the duty of every Member State government to protect and promote its official language(s) must be fully respected, it must not be exercised to the detriment of the lesser used languages and the people for whom they are the natural cultural vehicle'.⁴

Minority languages are placed within the context of 'European linguistic culture' (paragraphs B and E), thus implicitly classifying language as an element of culture and moving away from traditionally restrictive interpretations of the concept. The Parliament constructs a pragmatic justification for language policy, in line with arguments advanced in Chapter 1 *supra*, arguing that 'European integration must make the use of the most widespread languages as a way of communicating across the present internal borders compatible with protecting and safeguarding the less

³ The total number of votes cast was 325, which broke down as 318 in favour, one against and six abstentions; Dónall Ó Riagáin, Secretary General of the European Bureau for Lesser Used Languages, noted, however, that "[t]he size of the majority should not belie the fact that there had been stiff opposition to the report at various stages." (*Contact, ibid.*, p. 2).

⁴ Interestingly, the vote against the Resolution and the majority of abstaining votes were cast by French MEP's: as outlined in Appendix I, policies to promote the French language do operate to the detriment of France's minority languages, which are not officially recognised at domestic level.

widespread languages in regional or transregional contexts' (paragraph K). In this context, the Parliament drew expressly from the process of democratisation in central and eastern Europe, where cultural and linguistic rights have acute significance, given the political history of these nations. Overall, the Preamble does not really attempt to establish EC competence in language policy development directly; but the Resolution goes further, in terms of philosophical basis and the explicit allocation of responsibility to both the Community and its Member States, than any of its predecessors.

The main body of the Resolution commences with a call for full implementation of the Arfé and Kuijpers Resolutions; it proceeds to restate the need for official and practical recognition of minority languages by the Member States, in the domains of education, justice and public administration, the media and other sectors of public and cultural life (Article 4). The Parliament declares support for the Council of Europe's Charter for Regional or Minority Languages (Article 6) and calls on EC Member States to ratify the Charter 'as a matter of urgency...choosing at all times to apply those paragraphs best suited to the needs and aspirations of the linguistic communities in question' (Article 7). It was seen in Chapter 5 *supra* that state response to the Charter has been disappointing: only seven EC Member States have signed the Charter while only three of those States to date have proceeded to ratification.⁵ It is significant that the Parliament urged signatory states to apply the provisions most suited to the needs of language communities. It was argued in Chapter 5 that the Charter is overly state-oriented; if the Community can succeed in persuading states to consider the needs of language communities in the first instance, rather than state priorities and resources, it could contribute significantly to the effective implementation of the Charter. In Article 10, the Parliament calls on the Commission to take a number of positive steps; essentially, this section restates similar provisions from the earlier resolutions, including the far-reaching request that the Commission take the needs of minority language speakers into account when

⁵ The Charter has been signed by Austria, Denmark, Finland, Germany, Luxembourg, the Netherlands and Spain, and ratified by Finland, Germany and the Netherlands.

working out Community policy generally. This conforms with the policy integration clause set out in Article 128(4) EC, discussed in Chapter 4 *supra*. Articles 10(c) and (d) reflect technological innovations since the earlier resolutions, calling on the Commission to provide assistance for minority language projects in the context of digital television. Article 11(g) calls on the Commission to 'encourage the publication of the Treaties...and other basic provisions and information on the European Community and its activities in the Union's lesser used languages'. This measure relates to general reformation of EC language policy, proposed in Chapter 1 *supra*, which advocates the implementation in practice of a distinction between working and official languages that accommodates minority languages.

In one sense, in its reiteration of established goals and policies, the Killilea Report did not contribute anything new to the earlier resolutions. This might be considered disappointing, in view of the fact that it was the first Resolution grounded in the extended competences of the amended EC Treaty. But two points should be noted. First, preparation of the Report coincided with preparation of the Charter by the Council of Europe; Mr. Killilea decided that some of the more detailed proposals should be omitted from his Report and that the Parliament should instead use this opportunity to fully support the work of the Council.⁶ Second, while the Resolution did not contain many innovative or detailed recommendations for that reason, the tone of the Preamble is quite different from the pre-Maastricht initiatives. The objective of Community/Member State cooperation for the overall best interests of linguistic minorities has been stated more clearly than in any previous text. This concept of power-sharing is compatible with the objectives of Article 128 EC, with the principle of subsidiarity, now enshrined in the EC Treaty and with which the Parliament must have striven to conform, and with the evolving culture of shared competence more generally. As emphasised throughout this thesis, however, the success of the power-sharing structure is largely dependent on the Member States.

B. Communication from the Commission (1995)

*Calls for Proposals for European Commission Backing involving Actions in favour of Promoting and Safeguarding Regional or Minority Languages and Cultures*⁷

This Communication provides insight into whether or not the Commission has been receptive to the initiatives of the European Parliament. The Commission confirmed at the outset that it is the institution responsible for the implementation of any action in favour of regional or minority languages, which are defined as 'autochthonous languages traditionally spoken by part of the population of a European Union Member State [excluding] both immigrants' languages and artificially created languages'. The Commission stated adamantly that '[c]onsidering the competences of the Member States and in respect of the principle of subsidiarity, any activity with a political or statutory impact will be excluded'. This brief, disappointing interpretation shuts off a range of EC action *ab initio*. The Commission is restricted by the prohibition against harmonisation in Article 128 EC, for example; furthermore, the introduction of measures with direct statutory effect would contravene the limited legal measures set out in Article 128(5). But language policy is far broader than Article 128. Moreover, it was argued in Chapters 3 and 4 *supra* that the principle of subsidiarity may actually *require* rather than prevent Community action on minority languages, particularly in respect of the impact of the EC itself on language use, discussed in Chapter 1. It is also difficult to isolate action having 'political' effect. It is rarely possible to contain competences along definite or absolute Community/Member State lines. It would be possible to interpret the 'political effect' concept very broadly in order to oppose, for political reasons, even objectively innocuous measures. Neither did the Commission appear to consider policies that relate to the Community *itself* as a public entity, such as the accommodation of minority language rights in its own dealings with EU citizens, as proposed in Chapter 5 *supra*, or the translation of the Treaties into minority languages, as recommended by the Killilea Report. The cautious approach adopted by the Commission fits with

⁶ *supra* note 2, p. 1.

⁷ [1990] OJ C-322/34, 2 December 1995.

the 'self-censorship' thesis put forward by Philip, who suggests that the Commission "...has been chastened by the difficulty of getting public approval of the [Maastricht] Treaty and is signaling that it intends to exercise its rights of initiative more modestly...even if the scope of the Community's competence has been significantly widened."⁸ Seven years later, however, the Commission continues to confine itself to an extremely narrow range of initiatives in the field of culture.⁹ The Commission identifies projects in education, the media and culture as the priority areas for its allocation of financial assistance. These aspects of language planning are essential in any language policy but they also compound a limited, traditional interpretation of culture and do not address issues such as fundamental rights or even non-discrimination. The Commission has referred tentatively to minority language rights as an aspect of inclusive citizenship.¹⁰ It does not, however, intend to reflect this interpretation in the Treaty: it was shown in Chapter 5, for example, that the language rights granted to citizens of the EU in Article 8d EC are confined to the official EC languages only. Overall, the Commission has failed to grapple with the underlying premise of the equality of all language speakers; ironically, this goal is clearly evident in the Parliament resolutions from which the Commission has openly drawn its inspiration. In particular, the full potential of the changes in legal competence brought about by the Treaty on European Union have not been explored, indicating deference to Member State sensitivities. This is a prime yet unfortunate example of how the Commission can hide behind the subjective shield of subsidiarity without actually exploring its full implications in objective, qualitative terms.

At present, the future allocation of finance for even culturally-rooted language projects is at risk. Budget line B3-1006, dedicated to the provision of funds for these and other minority language initiatives *e.g.* funding the European Bureau for Lesser

⁸ Alan Butt Philip, "Old policies, new competencies" in Andrew Duff, John Pinder and Roy Pryce, *Maastricht and Beyond: Building the New Europe*, (London: Routledge, 1994), 123-139 at 129.

⁹ *cf.* Joachin Fronia (DGXXII), "The future role of the European Commission in respect of lesser used languages", (paper presented at *International Conference on Language Legislation*, Dublin, 14-17 October 1998; publication of proceedings forthcoming, 1999).

¹⁰ *ibid.*

Used Languages, was established in 1982, as a direct consequence of the first Arfé Resolution. It was not, however, authorised by a legislative act; at the time, there were no relevant Treaty Provisions upon which the Commission could base the allocation. The security of this arrangement has never been taken for granted; the reduction of the budget line for the first time in 1997 was considered to highlight its precarious foundation.¹¹ The most serious threat to its continued existence has been brought about, however, by the recent decision in *United Kingdom and ors v. Commission*, where the Court of Justice held that every significant EC expenditure must be grounded in the prior adoption of a legislative act.¹² A representative of DGXXII has predicted recently that while the discretionary budget line on minority languages is, therefore, currently endangered, it should be reinstated correctly in 2000, in accordance with the Court's decision.¹³ It is obviously a priority that these arrangements for the allocation of finance are enacted on a solid footing as soon as possible; but the Commission must then face up to the broader, illusory constraints it has placed on its own power of initiative in respect of EC minority language policy more generally. In the context of shared competence, accentuated by the fact that competence is not delimited expressly, the Commission is more or less pitted against the Member States, given that it is the Community's executive institution, duly accorded the power of initiative. In politically sensitive domains, the Commission is likely to play down this initiative, so as not to transgress Member State relations. This may be advisable in a political sense, but it necessarily curtails policy development in whatever the area concerned, on far from objectively justifiable grounds.

C. Euromosaic - Report for the European Commission (1996)

¹¹ cf. (1997) vol. 14:1 *Contact* 6-7.

¹² Case C-106/96 *United Kingdom and ors v. Commission* (Judgment of the Court, 12 May 1998); the Court did not, however, provide guidelines on what constitutes a 'significant' Community expenditure.

¹³ Fronia, *supra* note 9.

*The Production and Reproduction of the Minority Language Groups in the European Union*¹⁴

(i) Background

Euromosaic was prepared by four selected language centers on behalf of DGXXII. It collects "...the necessary background information on each of these linguistic communities that will facilitate applying the resources that are devoted to them..."¹⁵ The report is based on the premise that EC support for minority languages is "...a direct result of increasing demands from the European Parliament and other organisations which point to the need for public authorities to actively compensate for the negative effects of economic and political integration."¹⁶ Empirical analysis was undertaken to ascertain the potential for the production and reproduction of various language groups, as opposed to their languages *per se*, "...when confronted by an accelerated economic restructuring process."¹⁷ The ethos of the report is thus firmly rooted in the concept of linguistic security. The employment of social sciences theory and methodology distinguishes the report from the resolutions of the Parliament.

(ii) Findings and Commentary

Euromosaic is the first Community publication to grapple directly with the economic dimension of language policy. The Report first provides a comprehensive account of the methodology deployed in the study and proceeds to analyse the data collected. The results are placed in the context of emerging social and political discourses *i.e.* the contemporary, neo-liberal shift in emphasis from financial to human capital, the role of diversity in economic development, and the nature and process of European integration itself. It is concluded that language groups are centrally involved in these

¹⁴ European Commission, *Euromosaic: The Production and Reproduction of the Minority Language Groups in the European Union*, (Luxembourg: Office for Official Publications of the European Communities, 1996).

¹⁵ *ibid.*, Executive Summary, para. 1.

¹⁶ *ibid.*

¹⁷ *ibid.*, para. 7.

discourses and that "...a reevaluation of their importance is already in place, albeit that it has yet to feed through into a self-evident social policy."¹⁸ In particular, the authors note that the data collected "...highlights the shift in thinking about the value of diversity for economic development and European integration. It argues that language is a central component of diversity, and that if diversity is the cornerstone of innovative development then attention must be given to sustaining the existing pool of diversity within the EU."¹⁹ Significantly, the Report identifies that "...those language groups which are in a position to sustain themselves are those which receive considerable state support which activates and promotes the production and reproduction processes operating within civil society...[T]he demographic size of a language group is no guarantee of the group's viability capacity, with the existence of some of Europe's largest language groups being threatened."²⁰

The authors argue that the need for a programme of action to promote minority language groups, as a source of diversity that derives from language and culture, cannot be over-emphasised:

In many respects this is not a new insight, with one after another of the various reports presented to the Commission making similar suggestions. What is different in this Report is that whereas previous suggestions have conceived of minority language groups in emotive terms associated with the 'traditional' activities which are the emotional converse of rational 'modernity', concerned with the poetic, the literary or the musical, but never with the economic and the political, our argument involves the need to develop such action, not for the benefit of the various language groups as a European heritage, but for the economic advantage of the entire Community.²¹

In Chapter 1 *supra*, it was argued that the heritage aspect of culture, and its contribution to diversity, should not be discounted merely because of the invocation of emotive discourse. It was stressed, however, in Chapter 4, that policies focused solely on the aesthetic aspect of language will not redress the contemporary

¹⁸ *ibid.*, p. 45.

¹⁹ *ibid.*, para. 10 (Executive Summary).

²⁰ *ibid.*, para. 8/9.

²¹ *ibid.*, p. 60.

difficulties faced by speakers of minority languages; furthermore, the heritage dimension is not, as established in Chapter 5, a legitimate moral basis for language rights as fundamental rights. What is abundantly clear is that the Commission must continue but also move beyond its sponsorship of education and socialisation projects, and move towards pro-active planning rather than non-directional intervention.²² The study confirms the shift in contemporary political thought, which has begun to accommodate provision for diverse social groups in its philosophies. The role of the EC in this process is derived as follows:

[H]istory tells us that the goal of the state has nearly always involved the integration of civil society through homogenisation of cultural and linguistic elements. It is our claim that the future, in contrast, must involve a reorientation of that integration within the context of diversity and that the emergence of the supra-state affords an important opportunity to realise this goal."²³

Euromosaic is the most theoretically sophisticated study on minority languages undertaken to date. Its empirical, scientific approach contrasts sharply with those initiated by the Parliament, but *all* of these studies have contributed in different ways to the body of data now gathered by the Community institutions. If the Commission takes on board the recommendations made to it, in the context of a broader understanding of subsidiarity as well as the Community's contribution to the achievement of fundamental rights, then there is every reason to hope that a more effective and influential language policy, taking full account of the situation of minority languages, may yet emanate from the European Community. The evolution of political culture, as opposed to political theory, is a notoriously slow process. But, in light of monetary union and intensifying integration more generally, the Commission must now strive to embrace and implement the theoretical projections directed towards it, as the EC institution with power of initiative.

3. JURISPRUDENCE OF THE COURT OF JUSTICE

²² *ibid.*, pp. 60-1.

*A. Commission v. Luxembourg*²⁴

(i) Facts and Judgment of the Court

The maintenance of a nationality requirement for access to civil service positions in Luxembourg, in the public sectors of research, teaching, health, inland transport, posts and telecommunications, and utilities, was challenged by the Commission on the basis of Community law on the free movement of workers.²⁵ The initiation of these proceedings marked the culmination of almost three years of communication with the Luxembourg Government in respect of its policy; in fact, the lengthy duration of this pre-litigation procedure was one of the main reasons why the Government's preliminary argument of inadmissibility failed in the Court of Justice.²⁶ The Court's decision and the Opinion of Advocate General Léger focused primarily on the interpretation of the public service exception in Article 48(4) EC. The Court's existing case-law on strict and uniform interpretation of this derogation was confirmed: only civil service posts that necessitate a special relationship of allegiance with the state in question, or functions intended to safeguard the general interests of the state, can be considered to come within the ambit of Article 48(4).²⁷

Aside from arguments based on the interpretation of the public service exception, the Luxembourg Government raised the question of the protection of its national identity and argued as follows, in the specific context of teachers:²⁸

²³ *ibid.*, p. 13.

²⁴ Case C-473/93 *Commission v. Luxembourg* [1995] ECR I-3207.

²⁵ *i.e.* Article 48 EC; Articles 1 and 7 of Regulation (EEC) No. 1612/68 [OJ Special English Edition (II) 475]; the Commission acted in accordance with Communication 88/C 72/02 [[1988] OJ C72/2] on the elimination of restrictions on grounds of nationality that hinder access of workers from other Member States to certain posts in the public service.

²⁶ Judgment of the Court, *supra* note 24, p. 3254, paras. 17-24; the other reason for the failure of the inadmissibility contention was that the Luxembourg Government had been allowed four months to comply with the Commission's reasoned opinions, more than twice the time period usually allowed by the Commission.

²⁷ *ibid.*, p. 3255, para. 26 *et seq.*, especially para. 31.

²⁸ Other issues raised included the special demographic position of Luxembourg and the application of other international instruments, such as the European Convention on Establishment (1955).

[T]he fact that teachers have Luxembourg nationality guarantees that traditional values are passed on and, for a small country, it is essential in order to safeguard national identity...[I]t is difficult to imagine that a primary school teacher coming from abroad would be sufficiently familiar with the atmosphere in which Luxembourg children have spent the first few years of their life, that he would know the national customs, songs, poems and all the other elements forming part of the national psychological outlook which play a role in teaching at that level. Even in secondary education, a teacher's work cannot be regarded simply as an economic activity whereby knowledge is imparted in return for remuneration. The transmission of national culture continues at that level too.²⁹

This extract is reminiscent of the arguments made, and accepted, in the *Groener* decision, discussed in Chapter 2 *supra*, on the nature of the teaching function.³⁰ The Luxembourg Government went further in this case, however, extending the reasoning developed in the context of language policy to a more abstract concept of identity, based on nationality. The Court did not, however, accept the extended argument, but it did confirm the legitimacy of employing language policies in this context. It first referred to earlier case-law, confirming that teaching positions do not come within the public service exception in Article 48(4) EC.³¹ The Court continued as follows:

This conclusion cannot be shaken by considerations relating to the preservation of national identity in a demographic situation as specific as that prevailing in...Luxembourg. Whilst the preservation of the Member States' national identities is a legitimate aim respected by the Community legal order (as is indeed acknowledged in Article F(1) of the Treaty on European Union), the interest pleaded by the Grand Duchy can, even in such particularly sensitive areas as education, still be effectively safeguarded otherwise than by a general exclusion of nationals from other Member States. As the Advocate General points out...nationals of other Member States must, like Luxembourg nationals, still fulfill all the conditions required for recruitment, in particular those relating to training, experience and language knowledge. Consequently, the protection of national identity cannot justify exclusion of nationals of other Member States from all the posts in an area such as education, with the exception of those involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or other public authorities.³²

²⁹ *supra* note 24, p. 3232, para. 130.

³⁰ Case C-379/87 *Groener v. Minister for Education and the Dublin Vocational Education Committee* [1989] ECR 3967.

³¹ Judgment of the Court, *supra* note 24, p. 3257, para. 33, referring to Case 66/85 *Lawrie-Blum* [1986] ECR 2121 and Case 33/88 *Allué and Coonan* [1989] ECR 1591.

³² *ibid.*, p. 3258, paras. 35-6.

The legislation implementing the policies of the Luxembourg Government was, therefore, found to contravene Article 48 EC and Article 1 of Regulation 1612/68.

(ii) Commentary

The decision in this case confirms the Court's position in *Groener*, i.e. Member States may impose a linguistic competence requirement as a precondition to employment, so long as the linguistic knowledge required relates to the nature of the post to be filled, the policy applies to nationals as well as non-nationals and it is proportionate in respect of the aim to be achieved. Advocate General Léger discussed this element of the protection of identity in his Opinion, stating, for example, that "...access to posts which by their nature involve contact with the public may be in particular made subject to conditions regarding the knowledge of [official languages]."³³ The Advocate General proceeds, however, to adopt quite a peculiar reasoning, stating that "[i]n my view, the linguistic requirements to which access to numerous posts in the sectors concerned may be lawfully made subject should therefore in most cases allow only citizens born or long established in Luxembourg to respond to offers of employment or to participate in competitions conducted for recruitment purposes."³⁴ This ambiguous paragraph could conceivably be interpreted as some sort of consolation for the Luxembourg Government, that its language policies might have the indirect effect of achieving what its original nationality requirement could not be allowed to continue overtly. This goes absolutely against the principle that both direct *and* indirect discrimination are prohibited by Community law. It also contrasts sharply with the decision in *Groener*, where it was considered essential that, to justify the Irish Government's language policy, the required standard of competence must be attainable for non-nationals. The paragraph quoted is, therefore, a particularly curious and, indeed, careless statement. Neither the Advocate General nor the Court discussed language as a distinct marker of identity in any detail; the distinction between language and the other elements of identity put

³³ Opinion of the Advocate General, *ibid.*, p. 3243, para. 204.

³⁴ *ibid.*, p. 3244, para. 207.

forward by the Luxembourg Government was not, for example, explained. This is regrettable, given that language was effectively singled out as a legitimate basis for differentiation within certain parameters, such as proportionality. The particular status of Luxembourgish as a national but *de facto* minority language was not, however, commented upon.³⁵

B. Criminal Proceedings against Bickel and Franz³⁶

(i) Facts

The facts of this case resemble the earlier decision of the Court in *Mutsch*, discussed in Chapter 2 *supra*, but with one fundamental difference. The defendants are Austrian and German nationals respectively, both of whom were charged with criminal offences while visiting a region of Italy (Bolzano) where the German and Italian languages have the same official status. One practical effect of this language policy is that Italian citizens who are residents of the region, but *not* Italian citizens generally, have the right to choose either Italian or German as the language of the case for criminal proceedings. The present case concerns whether a similar right extends to the defendants under Community law. In both cases, pre-trial documents, such as summonses and adjournment orders, were issued in Italian. Both defendants declared that they did not have any knowledge of the Italian language and requested that the actual proceedings take place in German. In *Mutsch*, the defendant had been resident as a migrant worker in Belgium and it was decided that the right to choose the language of court proceedings, already granted to citizens of the region in Belgium, should be extended to migrant workers on the same conditions, under the ambit of its constituting a 'social advantage' (Regulation 1612/68). But neither defendant in the present case could claim status as a migrant worker: both were merely passing through the region at the time of the alleged commission of the offences. The following question was, therefore, referred to the Court of Justice in respect of both cases:

³⁵ Luxembourgish is a national but not official language of the Grand Duchy: *cf.* Appendix I.

³⁶ Case C-274/96, *Criminal Proceedings against Bickel and Franz*, Opinion of Advocate General Jacobs, 19 March 1998; Judgment of the Court, 24 November 1998 (not yet reported).

Do the principle of non-discrimination as laid down in the first paragraph of Article 6, the right of movement and residence for citizens of the Union as laid down in Article 8a and the freedom to provide services as laid down in Article 59 of the Treaty require that a citizen of the Union who is a national of a Member State and is present in another Member State be granted the right to call for criminal proceedings against him to be conducted in another language where nationals of that State in the same circumstances enjoy such a right?³⁷

Interestingly, the referring court itself submitted that all Community citizens should be entitled to have criminal *and* civil proceedings conducted through German if they so wish, on the grounds that not to grant such a right would amount to “...a manifest breach of the principle of non-discrimination on grounds of nationality....”³⁸ The Advocate General identified two issues to be decided: “...first, whether the choice of language in the criminal proceedings before the referring court comes within the scope of the Treaty; and secondly, whether the Italian rules, if construed so as to deny [the defendants] the right to use German, would entail discrimination on grounds of nationality.”³⁹ He distinguished the Court’s earlier decision in *Mutsch*, where language rights were conferred on non-nationals as a corollary of their status as migrant workers, rather than in the general contexts of freedom of movement and European citizenship *per se*.

(ii) Judgment of the Court

The Court held that “...exercise of the right to move...freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals.”⁴⁰ The Court acknowledged that establishing the rules of criminal procedure is generally within Member State competence, but stated that the fundamental principle of non-discrimination (Article 6 EC) and the overriding Community freedoms set legitimate limits to such internal legislative procedures. The contention of the Italian Government that the aim of the rules was to protect the

³⁷ Opinion of Advocate General Jacobs, para. 8

³⁸ *ibid.*, para. 9.

³⁹ *ibid.*, para. 10.

ethno-cultural minority residing in Bolzano was rejected. The Court confirmed that the protection of such a minority was a legitimate aim, but held that "...[i]t does not appear...that that aim would be undermined if the rules in issue were extended to cover German-speaking nationals of other Member States exercising their right to freedom of movement."⁴¹ The Court did not, however, elaborate on this statement.

(iii) Commentary

The Court delivered a judgment of fundamental significance to minority language groups yet, once again, the philosophical basis for its decision can best be derived by considering the Opinion of the Advocate General. In the first instance, Advocate General Jacobs did not take the application of Article 6 EC quite so much for granted. In order for Article 6 to apply in the present case, the alleged discrimination would have to be seen as coming 'within the scope of application of the Treaty'. Having established only tenuous connections between the alleged offences and Community law,⁴² the Advocate General introduced instead the general principle that "...criminal proceedings against a Community citizen based on alleged facts which occurred while that citizen exercised his right to free movement come within the scope of application of the Treaty and are therefore subject to the prohibition of discrimination on grounds of nationality."⁴³ He stressed that the extension of non-discrimination to cover criminal proceedings, arising in the course of the exercise of free movement, was particularly appropriate in light of the concept of EU citizenship.⁴⁴ He declared that it was still open to Member States to justify advantages reserved to nationals on grounds unrelated to nationality, but that it was becoming "...increasingly difficult to see why Community law should accept any type of difference in treatment which is based purely on nationality, except in so far as the

⁴⁰ Judgment of the Court, para. 16.

⁴¹ *ibid.*, para. 29.

⁴² Opinion of Advocate General Jacobs, paras. 13-16.

⁴³ *ibid.*, para. 15, relying on Case 186/87 *Cowan v. Trésor Public* [1989] ECR 195.

⁴⁴ The Advocate General made some strong remarks on the fundamental nature of Union citizenship and on the relevance of non-discrimination to citizenship; *cf.* paras. 23-24.

essential characteristics of nationality are at stake, such as access to a limited range of posts in the public service or the exercise of certain political rights.”⁴⁵ This perspective reflects the Court’s earlier decision in *Commission v. Luxembourg*, discussed *supra*.

Having established that non-discrimination on grounds of nationality applied to the circumstances of the case, the Advocate General went on to consider whether the Italian legislation discriminated against the two defendants. The Italian Government argued that the particular provision in question was *not* discriminatory on grounds of nationality, pointing out that even an Italian national not resident in Bolzano would not have been afforded the right to use German. It was also argued that the rule came within the scope of the protection of linguistic minorities and not the rules of criminal defence. In this context, the Government pointed out that the linguistic aspect of the rules of defence is already covered by the European Convention on Human Rights, discussed in Chapter 5 *supra*. The Government considered the legislation as a form of special constitutional protection, relating the right to use German in Bolzano to language choice rather than language competence. The Advocate General dismissed these arguments, however, on what can only be deemed pragmatic grounds:

The argument advanced by the Commission and the Italian Government that Italian nationals not resident in Bolzano cannot choose German either is beside the point. Being Italian-speakers, the overwhelming majority of Italian residents will have no practical interest in choosing German. In other words, German and Austrian visitors are without exception denied an advantage granted to most Italian residents who actually want that advantage...[T]he advantage in the present case, although regional in form, is in reality directed at a general category of residents, namely German-speakers.⁴⁶

This goes beyond the Court’s decision in *Mutsch*, where it was made clear that the rights accorded to the defendant were the same as those granted to Belgian citizens. The theme of citizenship is far more European in the present case: the Advocate General established a linguistic connection between groups of EU citizens that

⁴⁵ *ibid.*, para. 27.

⁴⁶ *ibid.*, paras. 37-8.

transcends national borders and, in fact, distinguishes them from other nationals of the host Member State. Following on from this, he considers whether the rule can be justified objectively on grounds other than nationality. He dismissed the possibility of justification on administrative grounds, pointing to the argument advanced by the defence that the appointment of an interpreter so that the proceedings could take place in Italian would lead to *extra* costs.⁴⁷ The Advocate General then considered the suggestion that the Italian legislation was justified on the grounds of the protection of a linguistic minority:

[It is not] possible, as the Italian Government suggests, to justify the rule on the ground that its purpose is to protect the German-speaking minority in Bolzano. I fully accept that the rule in question serves the *wholly legitimate aim of protecting a Member State's linguistic minority*, an aim unrelated to nationality. The difficulty, however, is that the exclusivity of the rule, that is to say, the denial of the advantage to visitors from other Member States, is neither a necessary nor an appropriate means of achieving that aim. In other words the rule is disproportionate. Refusing the use of German to visitors does not in any way serve that aim. If anything, it has the reverse effect: it reinforces Italian as the principal language even in the predominantly German-speaking region of Bolzano.⁴⁸

It is significant that the Advocate General based his decision on transnational considerations, in terms of the German language and European citizens, rather than national policy.⁴⁹ This is a remarkable advance from *Mutsch*. The decision of the Court ultimately supports this contention but was not framed in such explicit, progressive language. This is, in itself, disappointing, in light of the evolving and relatively consistent approach adopted by the Court over the past decade towards Member State minority language policies. The main difficulty lies in the perception that, in the absence of philosophical arguments, the decisions of the Court are concerned with fundamental Community principles over and above considerations of linguistic identity. What is often ignored in this context is that the limitations

⁴⁷ *ibid.*, para. 40; the Court also alluded briefly to this consideration, at. para. 30 of its judgment.

⁴⁸ *ibid.*, para. 41 (emphasis added).

⁴⁹ Some commentators, arguing from the perspective of the strict application of territorial language policy principles, consider that the decision in this case has permitted the invasion of regionally defined linguistic regions: *cf.* for example, Karl Reiner, "Human rights and the protection of minorities in the independent province of Bolzano-Bozen", (paper presented at the *International Conference on*

established by the Court, primarily considerations of non-discrimination and proportionality, are fundamental principles applied across the human rights law spectrum. But it must, perhaps, be enough for now to acknowledge that the results, if not the rhetoric, are clearly consistent with the best interests of the minority language group in any given case. This jurisprudence contributes significantly to the evolution of an inclusive and meaningful construction of European citizenship, based implicitly on the protection of fundamental rights.

4. CONCLUSION

The communications and case-law discussed in this Chapter indicate more the disclosure of, rather than change in, the attitude of the EC institutions towards the protection of linguistic diversity. In particular, the *Euromosaic* report and the Advocate General's Opinion in *Bickel and Franz* demonstrate that the institutions are keenly aware of the importance of maintaining linguistic diversity, for a variety of reasons. In light of these theoretical advances, the embryonic policies of the past will no longer suffice. This realisation has not, however, been arrived at unanimously. The restrictive approach adopted by the Commission and the relatively clumsy reasoning of the Court and Advocate General in *Commission v. Luxembourg* exhibit lingering uncertainties, traceable in particular to the ongoing battle between Community and Member State competence. The evolution of Community thinking is, however, clearly visible, when contrasted with earlier, almost disguised, attempts made by the Court in *Mutsch* and *Groener* to contribute to the establishment of a Community perspective on minority language protection. It is possible, therefore, to be cautiously optimistic that the Community, led by the Court and the Parliament, has begun to develop an *effective* role for its institutions; the looming threat still evident, however, is that their attempts might still be fatally frustrated by even the threat of political mutiny.

Language Legislation, Dublin, 14-17 October 1998, publication of proceedings forthcoming, 1999); but these arguments essentially reflect territorial rather than linguistic integrity.

CONCLUSION

The European Community has committed itself to the preservation of cultural diversity, a value ostensibly promoted by its constituent Member States. The EC institutions have recognised language as a fundamental aspect of culture. In the context of diversity, they have designed initiatives, and legitimated those undertaken by Member States, in favour of regional and minority languages. Certainly, a lot has been achieved. But there is a naive assumption that maintaining the existing ethos is somehow enough and that languages will basically sort themselves out in accordance with natural evolutionary trends.

A distorted linguistic environment has been created as a result of European integration, in that the relative utility of many European languages has been diminished by the spread of the languages of wider communication. The already precarious position of minority languages has been particularly affected. Language has an economic dimension but it is not an inherently economic concept. This does not, however, mean that the forces of economic integration have no impact on language use. The opposite has been shown to be true. Only the Community can tackle effectively the widespread and disruptive influence of intensifying integration on language patterns throughout the Member States. The implementation of counterbalancing EC policies is not just a goodwill gesture. It is a responsibility. If the Community portrays itself as a political entity that protects fundamental rights, cultural diversity and citizenship, then it must ensure that this benevolent image is a real one and not a manufactured ploy to gain credence and legitimacy. The fate of minority languages lies ultimately in the hands of their speakers: no-one is asking the EC to save minority languages single-handedly. Public authorities should not strive to fabricate the structures of linguistic behaviour, but societal conditions should be favourable to the exercise of fundamental language rights based on linguistic choice. When language domains are distorted by external forces, public authorities must attempt to redress the resulting imbalances. The EC, as a governing public authority, cannot side-step this responsibility.

The competences introduced by the Treaty on European Union are usually classified as 'new'. But almost seven years have passed. Why is EC competence in cultural matters still regarded as uncertain? Its contribution to cultural diversity is an explicit, Treaty-based Community objective. The principle of subsidiarity is often perceived as the death-knell in this context. But what effect does it really have in practice? At least in the domain of language policy, the Commission has precluded itself from exploring a wide range of substantive policy developments based on competence in cultural affairs and on the more political bases of fundamental rights and citizenship, by subscribing to a sweeping assumption that initiatives in these domains are prohibited by subsidiarity. This thesis shows that they are not. When subjected to scrutiny, the uncertainties attached to competence in the cultural and linguistic domains materialise in the political realm far more than in the legal one.

The tenuous relationship between the EC and its Member States is highlighted at several points throughout this thesis. It can only be said to reflect a certain immaturity on both sides. The Member States fear the implications of EC action on shared policy areas, notwithstanding the fact that it is they themselves that have caused these competences to be incorporated into the Treaty. The EC is not some abstract, autonomous entity that somehow divined these powers by and for itself. The transfer of power to the Community is essentially negated, however, by attaching artificial restrictions on its ability to develop and implement related policies. But it is more damaging, in the long term, to create the illusion of shared competence than to actually exercise it. Subsidiarity, despite its ideological background in the EC context, is not sustainable as one of these illusory restrictions. Subsidiarity could actually work. In light of the imminent devolution of power to Northern Ireland, Scotland and Wales, for example, subsidiarity may yet have to work, in accordance with its inherent rather than ascribed character; sub-national groups often bypass Member States where it is perceived that supra-national entities can serve their needs more efficiently and objectively. The Member States cite their commitment to cultural and linguistic diversity to resist any amendments to the official languages

regime presently operated by the Community. But, ironically, over-zealous promotion of national languages has been shown to operate against non-official languages, in clear contravention of the ethos of diversity. The Member States support European Parliament Resolutions on minority languages, but these instruments have no legal effect; more specifically, they do not place the Member States under any correlative legal duties of implementation. The Court of Justice has been criticised, on the other hand, for assessing Member State language policies against fundamental Community principles such as non-discrimination and proportionality, notwithstanding the fact that the application of these standards is common practice, both nationally and internationally, or that the Court has consistently delivered judgments that place the interests of languages and their speakers in clear priority.

The hushed, almost mystic, character of subsidiarity that has been encouraged by the EC institutions, especially the Commission, is equally damaging. It may well be part of a political game, to reassure the Member States that primary power in the areas of shared competence remains with them. But this causes the institutions to surrender powers they actually, legitimately have. This practice might soothe political tensions from time to time but, in the long run, it erodes the need for supra-national government in the first place. For how long can the primacy of national powers be contained within the so-called peripheral competences? The damaging consequences of clawing back powers retroactively cannot be ignored.

The present EC official languages regime does not really serve anyone efficiently, apart from bolstering the supremacy of state sovereignty. An operative distinction between official and working languages is both justified and necessary. A reformed language policy must, however, be inclusive. Over fifty million EU citizens speak languages other than those recognised officially by the Community. These minority languages contribute equally to the linguistic diversity allegedly valued by Member States and Community alike. Primary responsibility for the implementation of effective language rights lies with the Member States, who have had varying degrees

of success in the formulation of appropriate policies on minority languages. But the Community has distinct responsibilities also. First, in the context of languages generally, the EC must face up to the corrosive effect of economic and political integration on language shift throughout the Community. This applies equally to the smaller official languages but more acutely to minority languages, which are not recognised at all in the Community context. This responsibility will intensify as monetary union becomes a reality. Second, the present cultural initiatives supervised by the Commission must be broadened in scope. Projects on the aesthetic dimension of language are crucially important, but they are not enough. More effective initiatives on the public or official as well as cultural use of language have been advocated by the European Parliament in its various resolutions on minority languages. The Member States have already supported these measures through the support of their democratically elected representatives in the Parliament. It would be politically damaging for them to withdraw that support, should the Commission and Council actually decide to follow through in this context.

In the specific domain of the official use of language, there are two additional ways that the EC can evolve its language policy, neither of which falls foul of an objective assessment of subsidiarity. It can enhance the development of inclusive citizenship rights by providing for a language choice regime, including both official and non-official languages, in its dealings with EU citizens. Second, in accordance with the evolving culture of non-harmonisation and minimum standards, the Community can strive to secure the implementation of effective language rights in the Member States, taking on a coordinating and supervisory role. If the EC is truly committed to protecting the individual in the fundamental rights context, it must adapt and apply a broader perspective, not concentrating solely on rights that are connected to economic policy. The Community encompasses a lot more than economics and this should be acknowledged and reflected accordingly.

Notwithstanding the priority of monetary union, the EC continues to affect seemingly non-related aspects of everyday life. These so-called peripheral policy areas are far

from peripheral to the citizens of the EU, who deserve to have their priorities secured within the supra-national structure that effectively governs them yet still seems too remote. Culture cannot be ignored. The protection of fundamental rights must be consolidated. Language cannot be excluded from either context. At present, the evolution of EC language policy is being thwarted; it is a pawn in a subtle political battle of sovereignty, with subsidiarity as the chief weapon deployed, ironically, by both sides. The involvement of the European Community in minority language issues is not primarily, therefore, a question of competence; it is more a question of willingness, on all sides.

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APPENDIX I

RELEVANT CONSTITUTIONAL PROVISIONS OF THE EC MEMBER STATES

1. AUSTRIA

Minority language communities: Croat, Czech, Hungarian, Slovak, Slovenian and Rom.

Constitution of the Austrian Republic (1929/modified 1970)

Article 8

Without prejudice to the rights provided by federal law for linguistic minorities, German is the official language of the Republic.

Austria has signed the European Charter for Regional or Minority Languages.

2. BELGIUM

Minority language communities: Dutch, French and German.

Co-ordinated Constitution of the Belgian Kingdom (1831/modified 1980; 1989)

Article 3b

Belgium comprises four linguistic regions: the French language region, the Dutch language region, the bilingual region of Brussels-Capital, and the German language region.

Every commune in the Kingdom belongs to one of these linguistic regions.

The boundaries of the four regions may only be altered or amended by an act of Parliament passed on a majority vote in each linguistic group of each of the Houses, on condition that the majority of the members of each group are present and that the total voters in favour within two linguistic groups attain two thirds of the votes cast.

Article 3c

Belgium comprises three communities: the French community, the Flemish community, and the German-speaking community.

Each community enjoys the powers invested in it by the Constitution or such legislation as shall be enacted in terms thereof.

Article 23

The use of the languages spoken in Belgium is optional; it may only be regulated by law and only in the case of acts by public authorities and of legal matters.

Article 32b

For those cases prescribed in the Constitution, the elected members of each House are divided into a French language group and a Dutch language group in such manner as is laid down by law.

Article 38b

Except in the case of budgets and laws requiring a special majority, a reasoned motion signed by at least three quarters of the members of one of the linguistic groups and introduced after the report has been tabled and before the final voting in public session may declare that the provisions of a draft or proposed bill which it specifies are of such a nature as to have a serious effect on relations between the communities.

In such cases, parliamentary procedure is suspended and the motion is referred back to the Cabinet which, within a period of thirty days, gives its reasoned findings on the motion and invites the House to reach a decision either on those findings or on the draft or proposed bill in such form as it may have been amended.

This procedure may only be applied once by the members of a linguistic group in respect of one and the same draft or proposed bill.

Article 59b

1. There is a Council and an Executive for the French Community and a Council and an Executive for the Flemish Community whose composition and functioning are determined by law. Representatives of both Councils are elected. ...

3. Furthermore, the Community Councils, each in its own sphere, shall determine by decree, to the exclusion of the Legislative, the use of languages for:

- (1) administrative matters;

- (2) the education provided in establishments which are set up, subsidised or recognised by the public authorities;
 - (3) industrial relations between employers and their staff together with such business instruments and documents as are laid down by the law and regulations.
4. Such decrees...shall have the force of law respectively in the French language region and in the Dutch language region and also in respect of institutions established in the bilingual region of Brussels-Capital which, by virtue of their activities must be considered as belonging exclusively to one or other of the Communities.
- Such decrees...shall have the force of law respectively in the French language region and in the Dutch language region except as regards:
- such communes or groups of communes which are adjacent to another linguistic region where the law lays down or permits the use of a language other than that of the region in which they are located;
 - departments whose activities extend beyond the linguistic region in which they are established;
 - national and international institutions referred to in legislation whose activity is common to more than one community. ...

Article 59c

There is a council and an executive for the German language community whose composition and functioning are determined by law....Its decrees shall have the force of law in the German language region. ...

Article 86b

With the possible exception of the Prime Minister, the Cabinet comprises an equal number of French-speaking and Dutch-speaking ministers.

Article 108c

2. For those cases laid down in the Constitution and by legislation, the members of the urban area council are divided into a French language group and a Dutch language group in the manner prescribed by law. ...

4. In the urban area there is a French committee for culture and a Dutch committee for culture which are composed of an equal number of members elected respectively

by the French language group and by the Dutch language group in the urban area council.

Each has the same powers in respect of its community as the other organising authorities:

- (1) in pre-schooling, post-educational and cultural matters;
- (2) in education.

Article 140

The text of the Constitution is drawn up in French and in Dutch.

3. DENMARK

Minority Language Community: German.

No constitutional provisions dealing with language.

Denmark has signed the European Charter for Regional or Minority Languages.

4. FINLAND

Minority Language Communities: Swedish and Lapp.

Constitution of the Finnish Republic (1919)

Article 14

Finnish and Swedish shall be the national languages of the Republic.

The right of Finnish citizens to use their mother tongue, whether Finnish or Swedish, before the courts and the administrative authorities, and to obtain from them documents in these languages, shall be guaranteed by law; care shall be taken that the rights of the Finnish speaking population and the rights of the Swedish speaking population of the country shall be promoted by the state upon an identical basis.

The state shall provide for the intellectual and economic needs of the Finnish speaking and the Swedish speaking populations upon a similar basis.

Article 22

Laws and decrees as well as bills submitted by the Government to Parliament and the replies, recommendations, and other documents addressed by Parliament to the Government shall be drawn up in the Finnish and Swedish languages.

Article 50

For the purpose of general administration Finland shall remain divided into provinces, circuits and communes. ...

In redrawing the boundaries of the administrative districts, it is to be observed that these shall, as far as circumstances permit, be so constituted as to contain populations speaking only one language, Finnish or Swedish, or to make the language minorities as small as possible.

Article 75

Every Finnish citizen must take part in, or make his contribution to the defence of the country as prescribed by law.

Every conscript, unless he otherwise desires, shall if possible be enrolled in a military unit of which the rank and file speak his own mother tongue (Finnish or Swedish) and shall receive his training in that language. Finnish shall be the language of command of the Armed Forces.

Finland has signed and ratified the European Charter for Regional or Minority Languages.

5. FRANCE

Minority language Communities: German/Alsatian, Basque, Breton, Catalan, Corsican, Francique/Luxembourgish, Dutch/Flemish and Occitan.

Constitution of the French Republic (1958/modified 1992)

Article 2

The language of the Republic is French.

This provision has been implemented by legislative acts, e.g. Constitutional Law No. 94-665 (4 August 1994) re: the use of the French Language, which recognise and

promote the French language only, to the exclusion of all other languages spoken in the Republic.

6. GERMANY

Minority Language Communities: Danish, Frisian, Sorb and Romanès.

Basic Law of Germany (1949/amended 1990)

Article 3

No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith or his religious or political opinions.

Germany has signed and ratified the European Charter for Regional or Minority Languages.

7. GREECE

Minority Language Communities: Albanian/Arvanite, Aroumanian, Pomak, Slav-Macedonian and Turkish.

Constitution of the Greek Republic (1975)

Article 3

The text of the Holy scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople is prohibited.

Article 5

All persons living within the Greek territory shall enjoy full protection of their life, their honour and freedom, irrespective of nationality, race or language and of religious or political beliefs. Exceptions shall be permitted only in cases provided for in international law.

8. IRELAND

Minority Language Community: Irish/Gaeilge

The Irish Constitution (1937)

Article 8

1. The Irish language as the national language is the first official language.
2. The English language is recognised as a second official language.
3. Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.

Article 25.4.3°

Every bill shall be signed by the President in the text in which it was passed...by both Houses of the *Oireachtas*, and if a bill is so passed...in both the official languages, the President shall sign the text of the bill in each of those languages.

Article 25.4.4°

Where the President signs the text of a bill in one only of the official languages, an official translation shall be issued in the other official language.

Article 25.4.6°

In case of conflict between the texts of a law enrolled under this section in both the official languages, the text in the national language shall prevail.

Article 25.5.4°

In case of conflict between the texts of any copy of this Constitution...the text in the national language shall prevail.

A comprehensive Language Act will be introduced in 1999.

9. ITALY

Minority Language Communities: Albanian/Arbërishtja Catalan, Croat, French/Francoprovençal, Friulan, German (and variants), Greek, Ladin, Occitan, Roma, Sard and Slovenian.

Constitution of the Italian Republic (1948)

Article 3

All citizens are invested with equal social status and are equal before the law, without prejudice as to sex, race, language, religion, political opinions and personal or social conditions.

Article 6

The Republic shall safeguard linguistic minorities by means of special provisions.

Recognition and status of minority languages vary from region to region within Italy.

10. LUXEMBOURG

Minority Language Community: Luxembourgish (Lëtzebuergesch).

Constitution of the Grand Duchy of Luxembourg (1868)

Article 29

The law will determine the use of languages in administrative and judicial matters.

The Law on the Linguistic Regime (24 February 1984) establishes that Luxembourgish is the national language of Luxembourg, French is the legislative language and French, German and Luxembourgish may be used in administrative and judicial matters.

Luxembourg has signed the European Charter for Regional or Minority Languages.

11. THE NETHERLANDS

Minority Language Community: Frisian.

No Constitutional Provisions dealing with language.

The Netherlands has signed and ratified the European Charter for Regional or Minority Languages.

12. PORTUGAL

No indigenous minority language communities.

Constitution of the Republic of Portugal (1976/amended 1987)

Article 13

No one may be privileged, benefited, damaged, deprived of any right or exempt from any responsibility by virtue of influence, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic or social status.

Article 74

3. In the implementation of an educational policy, the state is obliged...

(h) to provide instruction in the Portuguese language and access to Portuguese culture to the children of immigrants.

13. SPAIN

Minority Language Communities: Aragonese, Aranese, Asturian, Basque, Catalan and Galician.

Constitution of the Kingdom of Spain (1978)

Article 3

1. Castilian is the official Spanish language of the state. All Spaniards have the duty to know it and the right to use it.

2. The other languages of Spain will also be official in the respective autonomous communities, in accordance with their statutes.

3. The richness of the linguistic modalities of Spain is a cultural patrimony which will be the object of special respect and protection.

Article 148

The Autonomous Communities may assume jurisdiction in the following matters...

(17) assistance to culture, research and, as the case may be, for the teaching of the language of the Autonomous Community.

The respective Statutes of Autonomy for the Basque Country, Catalonia and Galicia were enacted in 1979.

14. SWEDEN

Minority Language Communities: Finnish and Lapp.

Constitution of the Swedish Republic (1975)

Article 8

In the exercise of their functions the courts and administrative authorities shall maintain objectivity and impartiality. They may not without legal grounds treat persons differently by reason of their personal conditions such as faith, opinions, race, skin colour, origin, sex, age, nationality, language, social status, or financial circumstances.

15. THE UNITED KINGDOM

Minority Language Communities: Cornish, Gàidhlig, Irish, Scots and Welsh.

The United Kingdom does not have a written constitution.

The Welsh Language Act was enacted in 1993.

APPENDIX II

TEXT OF THE RESOLUTIONS OF THE EUROPEAN PARLIAMENT

1. Arfé Resolution (1981)

Resolution on a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities

16 October 1981, [1984] OJ C-287/106.

THE EUROPEAN PARLIAMENT,

- having regard to the resurgence of special movements by ethnic and linguistic minorities aimed at bringing about a deeper understanding and recognition of their historical identity,
- recognising the revival of regional languages and cultures associated with these movements as a source of enrichment for European civilisation and as an indication of its vitality,
- having regard to the declarations of principle made by the most representative and authoritative international organisations, from the UN to the Council of Europe, and to the most recent and widely accepted political, legal and anthropological theories,
- referring to Resolution No 1 of the Oslo Conference (1976) of the European Ministers responsible for cultural affairs,
- considering that all governments in the Community have acknowledged in principle the right of such groups to freely express themselves and their culture and have, in most cases, drawn up legislation in this specific field and begun co-ordinated programmes of action,
- considering that a cultural identity is today one of the most important non-material psychological needs,
- considering that autonomy must not be regarded as an alternative to the integration of peoples and different traditions, but as a means of guiding the process necessary for increasing intercommunication,

- considering therefore that linguistic and cultural heritage cannot be safeguarded unless the right conditions are created for their cultural and economic development,
- determined to bring about a closer union among the peoples of Europe and to preserve their living languages, drawing on their diversity in order to enrich and diversify their common cultural heritage,
- having regard to motions for resolutions Docs. 1-371/79, 1-436/79 and 1-790/79,
- having regard to the report of the Committee on Youth, Culture, Education, Information and Sport and to the opinion of the Committee on Regional Policy and Regional Planning (Doc. 1-965/80),

1. Requests National Governments and regional and local authorities, despite the wide differences in their situations and having due regard to the degree of independence which they enjoy, to implement a policy in this field inspired by and designed to achieve the same objectives, and calls on them:

(a) in the field of education:

- to allow and promote the teaching of regional languages and cultures in official curricula right through from nursery school to university;
- to allow and provide for, in response to needs expressed by the population, teaching in schools of all levels and grades to be carried out in regional languages, with particular emphasis being placed on nursery school teaching so as to ensure that the child is able to speak its mother tongue;
- to allow teaching of the literature and history of the communities concerned to be included in all curricula;

(b) in the field of mass communications:

- to allow and take steps to ensure access to local radio and television in a way that guarantees consistent and effective community communication and to encourage the training of specialist regional presenters;

- to ensure that minority groups receive organisational and financial assistance for their cultural events equivalent to that received by the majority groups;

(c) in the field of public life and social affairs:

- to assign in accordance with the Bordeaux declaration of the Council of Europe Conference of Local Authorities, a direct responsibility to the local authorities in this manner;
- to promote as far as possible a correspondence between cultural regions and the geographical boundaries of the local authorities;
- to ensure that individuals are allowed to use their own language in the field of public life and social affairs in their dealings with official bodies and in the courts;

2. Requests the Commission to provide, as soon as possible, recent, accurate and comparable data on the attitudes and behaviour of the public in the Member States towards regional languages and cultures in their various countries;

3. Calls on the Commission to set up pilot projects in the language teaching sector to try out methods of multilingual education capable of ensuring both the survival of the individual cultures and their openness to the outside world;

4. Recommends that the Regional Fund provide financial assistance for projects designed to support regional and folk cultures and calls upon the Commission to include measures in its educational and cultural programmes to promote a European cultural policy which takes account of the aspirations and expectations of all its ethnic and linguistic minorities who are looking towards Europe and its institutions with confidence and hope;

5. Recommends that the Regional Fund should contribute to the financing of regional economic projects since the cultural identity of a region can only exist if the population are able to live and work in their own area;

6. Calls on the Commission to review all Community legislation or practices which discriminate against minority languages;

7. Instructs its President to forward this resolution to the Council and the Commission, to the governments and regional authorities of the Member States and to the Council of Europe.

2. *Arfé Resolution (2) (1983)*

Resolution on Measures in favour of Minority Languages and Cultures

11 February 1983, [1983] OJ C-68/103

THE EUROPEAN PARLIAMENT,

- Considering that some 30 million Community citizens have as their mother tongue a regional language or a little-spoken language,
- Aware of the resurgence of special movements by ethnic and linguistic minorities aimed at bringing about a deeper understanding and recognition of their historical identity,
- Having regard to its own resolution of 16 October 1981 on the subject,

1. Calls on the Commission:

- to continue to intensify its efforts in this area, particularly in relation to establishing pilot projects and studies,
- to review all Community and national legislation and practices which discriminate against minority languages, and prepare appropriate Community instruments for ending such discrimination,
- to report to Parliament by the end of 1983 on the outcome of action taken on the two points above;

2. Calls on the Commission to report to Parliament on the practical measures taken or due to be taken in the near future to encourage regional and folk cultures and cultural

policy in the context of media and culture programmes and to finance regional economic projects under the Regional Fund within the meaning of paragraphs 4 and 5 of the resolution of 16 October 1981;

3. Calls on the Council to ensure that the principles of Parliament's resolution are respected in practice;

4. Believes that Parliament should continue to monitor progress in this area at Community level, and that the appropriate parliamentary committees should hold a joint meeting to consider how best this should be done;

5. Instructs its President to forward this resolution to the Commission, Council, Council of Europe and the governments of the Member States.

3. Kuijpers Resolution (1987)

Resolution on the Languages and Cultures of Regional and Ethnic Minorities in the European Community

30 October 1987, Doc. A 2-150/87

THE EUROPEAN PARLIAMENT

- having regard to the motion for a resolution by Mr. Columbu and others on linguistic rights in Northern Catalonia (Doc. 2-1259/84),
- having regard to the motion for a resolution by Mr. Kuijpers and Mr. Vandemeulebroucke on the protection and promotion of regional languages and cultures in the Community (Doc. B2-76/85),
- having regard to the motion for a resolution by Mr. Rossetti and others on the recognition of the rights of minorities and the full recognition of their cultures (Doc. B2-321/85),
- having regard to the motion for a resolution by Mr. Vandemeulebroucke and Mr. Kuijpers on the Commission's failure to implement the European Parliament's

resolution on a Community charter of regional languages and cultures and a charter of rights of ethnic minorities (Doc. B2-1514/85),

- having regard to the motion for a resolution by Mr. Kuijpers and Mr. Vandemeulebroucke on the recognition of free radio stations (Doc. B2-1532/85),
- having regard to the motion for a resolution by Mr. Vandemeulebroucke and others on a Frisian television service in Friesland (Doc. B2-31/86),
- having regard to the motion for a resolution by Mr. Kuijpers and Mr. Vandemeulebroucke on the projected withdrawal of the grant from the Netherlands Ministry of Welfare, Health and Cultural Affairs for the Association for the Promotion of Standard Dutch and the detrimental consequences thereof for transfrontier co-operation in the field of culture (Doc. B2-890/86),
- having regard to the motion for a resolution by Mr. Columbu and others on the establishment of institutes for the study of minority languages (Doc. B2-1015/86),
- having regard to the motion for a resolution by Mr. Rubert de Ventós on the obstacles to the use of Catalan in the universities and on television (Doc. B2-1323/86),
- having regard to the motion for a resolution by Mr. Mizzau and others on support for institutions and associations for the study of minority languages (Doc. B2-1346/86),
- having regard to the motion for a resolution by Mr. Kuijpers and others on the integration of the bilingual Basque-French schools run by the SEASKA association (Doc. B2-149/87),
- having regard to the motion for a resolution by Mr. Colom i Naval on improving the position of minority languages within the EEC (Doc. B2-291/87),
- having regard to the Committee on Youth, Culture, Education, Information and Sport and the opinion of the Committee on Legal Affairs and Citizens' Rights (Doc. A2-150/87),
- having regard to its resolution of 16 October 1981 on a Community charter of regional languages and cultures and on a charter of rights of ethnic minorities and

its resolution of 11 February 1983 on measures in favour of minority languages and cultures,

- having regard to the basic principles regarding rights of minorities formulated and approved by the United Nations and the Council of Europe,
- regretting that so far, the Commission has not put forward any proposals to implement the above-mentioned resolutions which deal comprehensively with the problems of ethnic, linguistic and cultural minorities in the Community,
- whereas there are still many obstacles to the full development of the specific cultural and social identity among the national and linguistic minorities, and whereas attitudes towards these minorities and their problems frequently reveal a lack of appreciation and understanding and, in some cases, are based on discrimination,
- having regard to the final declaration of the European Community and its resolution of 13 April 1984 on the role of the regions in the construction of a democratic Europe and the outcome of the Conference of the Regions, in which it is noted that strengthening the autonomy of the regions in the Community and the creation of a politically more unified European Community represent two complementary and convergent aspects of a political development which is essential to cope effectively with the future tasks of the Community,
- noting that regional economic conditions determine the prospects for the expression and development of the local culture so that appropriate measures should therefore be worked out within a balanced European regional policy that starts from a regional basis and is designed to counteract the exodus from outlying regions to the centre,

1. Calls for the principles and proposals set out in its above-mentioned resolutions of 16 October 1981 and 11 February 1983 to be fully applied;

2. Points out once again the need for the Member States to recognise their linguistic minorities in their laws and thus to create the basic condition for the preservation and development of regional and minority cultures and languages;

3. Calls on the Member States whose Constitutions already contain general principles concerning the protection of minorities to make timely provision on the basis of organic laws, for the implementation of those principles;

4. Supports the Council of Europe's efforts to draw up a European Charter of regional and minority languages;

5. Recommends to the Member States that they carry out educational measures including:

- arranging for pre-school to university education and continuing education to be officially conducted in the regional and minority languages in the language areas concerned, on an equal footing with instruction in the national languages,
- officially recognising courses, classes and schools set up by associations which are authorised to teach, under the regulations in force in the country concerned, and which use a regional or minority language as the general teaching language,
- giving particular attention to the training of teaching staff in the regional or minority languages and making available the educational resources required to accomplish these measures,
- promoting information on educational opportunities in the regional and minority languages,
- making provision for the equivalence of diplomas, certificates, other qualifications and evidence of professional skills so that members of regional or minority groups in one Member State may have easier access to the labour market in culturally related communities in other Member States;

6. Recommends to the Member States that they carry out administrative and legal measures including:

- providing a direct legal basis for the use of regional and minority languages, in the first instance in the local authorities of area where a minority group does exist,

- reviewing national provisions and practices that discriminate against minority languages, as called for in Parliament's resolution of 16 January 1986 on the rise of fascism and racism in Europe,
- requiring decentralised central government services also to use national, regional and minority languages in the areas concerned,
- officially recognising surnames and place names expressed in a regional or minority language,
- accepting place names and indications on electoral lists in a regional or minority language;

7. Recommends to the Member States that they take measures in respect of the mass media, including:

- granting and making possible access to local, regional and central public and commercial broadcasting systems in such a way as to guarantee the continuity and effectiveness of broadcasts in regional and minority languages,
- ensuring that minority groups obtain organisational and financial support for their programmes commensurate with that available to the majority,
- support for the training of journalists and media staff required to implement these measures,
- putting the latest technology to the service of the regional and minority languages,
- taking account of the extra costs entailed by provision for special scripts, such as Cyrillic, Hebrew, Greek, etc.;

8. Recommends to the Member States that they take measures in respect of the cultural infrastructure including:

- ensuring that representatives of groups that use regional or minority languages are able to participate directly in cultural facilities and activities,
- the creation of foundations and institutes for the study of regional and minority languages, one of whose tasks would be to set up the educational machinery for

the introduction of regional and minority languages in schools and draw up a “general inventory” of the regional and minority language concerned,

- the development of dubbing and subtitling techniques to encourage audio-visual productions in the regional and minority languages,
- provision of the necessary material and financial support for the implementation of these measures;

9. Recommends to the Member States that they take social and economic measures including:

- providing for the use of the regional and minority languages in public concerns (postal service, etc.),
- recognition of the use of the regional and minority languages in the payments sector (giro cheques and banking),
- providing for consumer information and product labelling in regional and minority languages,
- providing for the use of regional languages for road and other public signs and street names;

10. Recommends to the Member States that they take measures in respect of the regional and minority languages that are used in several Member States, particularly in frontier areas, including:

- providing for the appropriate cross-frontier co-operation machinery for cultural and linguistic policy,
- promotion of cross-frontier co-operation in accordance with the European Outline Convention on Transfrontier Co-operation between Communities or Territorial Authorities;

11. Calls on the Member States to encourage and support the European Bureau for Lesser Used Languages and its national committees in each of the Member States;

12. Calls on the Commission to:

- do all it can within its terms of reference to implement the measures set out in paragraphs 5 to 10,
- take account of the languages and cultures of regional and ethnic minorities in the Community when working out the various areas of Community policy, particularly with regard to Community measures in the field of cultural and educational policy,
- accord the European Bureau for Lesser Used Languages official consultative status,
- make provision for a system of mutual study visits to increase mutual knowledge of minorities,
- reserve the necessary broadcasting time for minority cultures in European television,
- give the necessary attention to linguistic minorities in the Community's information publications;

13. Calls on the Council and Commission to continue their support and encouragement for the European Bureau for Lesser Used Languages by

- ensuring adequate budgetary resources and the reinstatement of a separate budget line,
- proposing the necessary budget funds for the implementation of the measures set out above,
- allocating ERDF and ESF funds for programmes and projects on behalf of regional and popular cultures,
- reporting annually to Parliament on the situation of the Community's regional and minority languages and measures taken in this connection by the Member States and the Community;

14. Stresses its determination to ensure that adequate provision is made for action in favour of minority languages and that at least 1 million ECU is entered in the 1998 budget;

15. Stresses categorically that the recommendations contained in this resolution are not to be interpreted or implemented in such a way as to jeopardise the territorial integrity or public order of the Member States;

16. Instructs its appropriate committee to draw up separate reports on the languages and cultures of non-permanent Community citizens, Community citizens living in another Member State from that from which they come, migrants and overseas minorities and points out that each of these groups share many of the disadvantages of speakers of lesser used languages and that their specific problems deserve detailed and separate treatment;

17. Decides that the Intergroup on Lesser Used Languages shall be granted full status as an official Intergroup of the European Parliament;

18. Instructs its President to forward this resolution to the Commission, the Council, the national and regional governments of the Member States, the Consultative Assembly of the Council of Europe and the Standing Conference of Local and Regional Authorities of Europe.

4. Killilea Resolution (1994)

Resolution on Linguistic and Cultural Minorities in the European Community

9 February 1994, [1994] OJ C-061/110

THE EUROPEAN PARLIAMENT

- having regard to its resolution of 16 October 1981 on a Community charter of regional languages and cultures and a charter of rights for ethnic minorities,
- having regard to its resolution of 11 February 1983 on measures in favour of minority languages and cultures,
- having regard to its resolution of 30 October 1987 on the languages and cultures of regional and ethnic minorities in the European Community,

- having regard to its resolution of 21 January 1993 on the Commission communication to the Council, the European Parliament and the Economic and Social Committee entitled “New Prospects for Community cultural action”,
- having regard to the motions for resolutions by:
 - Mr Hume and others on the minority languages (B3-0016/90);
 - Mr. Gangoiiti Llaguno on the promotion and use of regional and/or minority languages (B3-2113/90);
 - Mr Bandrés Molet on granting broadcasting licences to Basque-language radio stations (B30523/91);
 - Mrs Van Hemeldonck on the signing of the European Charter of regional and minority languages (B3-1351/92);
- having regard to the European Charter for Regional or Minority Languages, accorded the legal form of a European Convention by the Council of Europe, and opened for signature on 5 November 1992,
- having regard to the final document of the Copenhagen meeting of the CSCE Conference on the Human Dimension of the CSCE (5-29 June 1990) and in particular to Chapter IV of that document,
- having regard to the Charter of Paris for a New Europe (CSCE) adopted in Paris on 21 November 1991,
- having regard to rule 148 of its Rules of Procedure,
- having regard to the report of the Committee on Culture, Youth, Education and the Media and the opinion of the Committee on Legal Affairs and Citizens’ Rights (A3-0042/94),
- encouraged by the commitment, contained in Article 128 of the EC Treaty, to the Community contributing to the flowering of the cultures of the Member States while respecting their national and regional diversity,
- declaring the need for a European linguistic culture and recognising that its scope also includes protection of the linguistic heritage, the overcoming of the language barrier, the promotion of lesser-used languages and the safeguarding of minority languages,

- encouraged by the process of democratisation in central and eastern Europe and in particular by the determination of recently democratised peoples to promote their own languages and cultures,
- whereas all peoples have the right to respect for their language and culture and must therefore have the necessary legal means to protect and promote them,
- whereas the linguistic diversity of the European Union is a key element in the Union's cultural wealth,
- whereas the protection and promotion of the Union's linguistic diversity is a key factor in the creation of a peaceful and democratic Europe,
- whereas the Community has a responsibility to support the Member States in developing their cultures and protecting national and regional diversity, including the diversity of indigenous regional and minority languages,
- whereas the Community should encourage action by the Member States in cases where the protection of such languages and cultures is inadequate or non-existent,
- whereas the Community also has a duty in its relations with the governments of associated and third countries to draw attention to the rights of minorities and, if necessary, to support governments in finding ways of ensuring that these rights are safeguarded; whereas it must also condemn any deliberate denial of these rights,
- whereas the linguistic diversity of the European Union is a reflection of its cultural diversity and too often goes unrecognised,
- whereas language is an essential means of communication in the European Union now being created and whereas European integration must make the use of the most widespread languages as a way of communicating across the present internal borders compatible with protecting and safeguarding the less widespread languages in regional or transregional contexts,
- whereas the minority languages and cultures are also an integral part of the Union's culture and European heritage and whereas, from this point of view, the Community should provide them with legal protection and the appropriate financial resources to this end,

- whereas many lesser used languages are endangered, with a rapid drop in the number of speakers, and whereas this threatens the well-being of specific population groups and greatly diminishes Europe's creative potential as a whole,
- whereas, while the duty of every Member State government to protect and promote its official languages must be fully respected, it must not be exercised to the detriment of the lesser used languages and the people for whom they are the natural cultural vehicle,
- whereas, however, the term "minority languages and cultures" may embrace phenomena of differing characteristics and dimensions according to the Member State in question and may be understood as referring to certain languages which are already official in some Member States but which do not receive adequate dissemination or identical status in the neighbouring Member State or another Member State,

1. Calls for the principles and proposals set out in its aforementioned resolutions of 16 October 1981, 11 February 1983 and 30 October 1987 to be fully applied;
2. Points out again the need for Member States to recognise their linguistic minorities and to make the necessary legal and administrative provisions for them to create the basic conditions for the preservation and development of these languages;
3. Believes, furthermore, that all minority languages and cultures should also be protected by appropriate legal statute in the Member States;
4. Considers that this legal statute should at least cover the use and encouragement of such languages and cultures in the spheres of education, justice and public administration, the media, toponymics and other sectors of public and cultural life without prejudice to the use of the most widespread languages, when required to ensure ease of communication within each of the Member States or in the Union as a whole;

5. Points out that the fact that a proportion of the citizens of a state use a language of have a culture which is different from the dominant one in that state or form the dominant one in a part of region of that state should not give rise to discrimination of any kind or, in particular, to any form of social marginalisation that would impede their access to, or continuance in, employment;
6. Supports the European Charter for Regional or Minority Languages, accorded the legal form of a European Convention as an effective yet flexible instrument for the protection ad promotion of lesser used languages;
7. Calls on the Member State governments which have not yet done so as a matter of urgency to sign and their parliaments to ratify the Convention choosing at all times to apply those paragraphs best suited to the needs and aspirations of the linguistic communities in question;
8. Calls on the Member State governments and on the local and regional authorities to encourage and support specialised associations, in particular the Member State Committees of the European Bureau for Lesser Used Languages so that the responsibilities of citizens and their organisations for the development of their language can be realised;
9. Urges the Member States and the relevant regions and local authorities to examine the possibility of concluding agreements to create trans-frontier linguistic institutions for any minority languages or cultures existing in two neighbouring countries or in several Member States simultaneously;
10. Calls on the Commission to:
 - (a) contribute, within its field of competence, to the implementation of the initiatives undertaken by Member States in this area;
 - (b) take account of the lesser used languages and their attendant cultures when working out various areas of Community policy, and make equivalent provision for

the needs of speakers of lesser used languages, alongside the needs of speakers of the majority languages, in all educational and cultural programmes, *e.g.* YOUTH FOR EUROPE, ERASMUS, TEMPUS, European Dimension, Platform Europe, MEDIA, schemes for the translation of contemporary literary work;

(c) encourage the use of lesser used languages in the Community's audio-visual policy, for instance in respect of High Definition television and assist lesser used language producers and broadcasters to produce new programmes in 16:9 format;

(d) ensure that modern digital telecommunications technology, which allows for the compressing of satellite and cable broadcast transmissions, is used for carrying a greater number of minority languages;

(e) put in place as quickly as possible a programme inspired by LINGUA for lesser used languages such as the Mercator education network;

(f) facilitate the immediate publication, after corrections and additions, of the scientific map of lesser used language communities in the EC, prepared by the European Bureau for Lesser Used Languages;

(g) encourage the publication of the Treaties of the European Communities and other basic provisions and information on the European Community and its activities in the Union's lesser used languages;

11. Calls on the Council and Commission to:

(a) continue their support and encouragement for European organisations representing the lesser used languages, particularly the European Bureau for Lesser Used Languages, and to provide them with the necessary resources;

(b) ensure that adequate budgetary provision is made for the Community's programmes in favour of lesser used languages and their attendant cultures and propose a multiannual action programme in this field;

(c) take due account of the linguistic and cultural heritage of regions in the development of regional policy and in the allocation of funds from the ERDF by supporting integrated regional development projects which include measures to support regional languages and cultures, as well as in the development of social policy and in the allocation of funds from the ESF;

- (d) take due account of the needs of speakers of lesser used languages in the countries of central and eastern Europe, when developing EC programmes for economic and social reconstruction, and in particular the PHARE programme;
- (e) encourage the translation of books and literary works and the subtitling of films between minority languages or into Community languages;
- (f) ensure that in encouraging minority languages, the European Community does not do so to the detriment of the main relevant national language and must, in turn, ensure that this in no way affects the teaching of that main language in schools;

12. Calls for the languages spoken on overseas territories belonging to the Member States to enjoy the same rights and provisions as mainland languages;

13. In relation to non-territorial autochthonous languages (*e.g.* the Roma and Sinti languages and Yiddish) calls on all relevant bodies to apply *mutatis mutandis* the recommendations set out in this resolution;

14. Stresses that the recommendations contained in this resolution are not such as to jeopardise the territorial integrity or public order of the Member States and furthermore, are not to be interpreted as implying the right to enter into any activity or carry out any action which contravenes the objectives of the United Nations or any other obligation laid down in international law;

15. Instructs its President to forward this resolution to the Commission, the Council, the central and regional governments of the Member States, the Parliamentary Assembly of the Council of Europe, the Standing Conference of Local and Regional Authorities of Europe, the Conference for Security and Co-operation in Europe, the United Nations and UNESCO.